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REPORTS OF CASES

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ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

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B

B

Bar

Bea

Bell

Benn

F

A TABLE OF CASES REPORTED IN THIS VOLUME.

Versus is always put after the plaintiff's name.

A.

Adamson v. Adamson.	
Statute of Limitations—Equitable remainder—Practice—Dismissal of former bill—Reading evidence in former suit—Secondary evidence—Res judicata	221
Allan v. McTavish.	
Fraudulent conveyance—Evidence—Res judicata—Ancient document—Statute of Elizabeth	539
Attorney-General of Ontario <i>ex rel</i> Barrett v. The International Bridge Co.	
Injunction—Bridge company—Railway company—Costs	65
B.	
Bank of Montreal, The, Nelles v.	
Insolvency—Preferential transfer—Bond fide advance to carry on business	449
Bank of Toronto v. Beaver and Toronto Mutual Ins. Co.	
Mutual insurance company—Debentures for money borrowed— <i>Ultra vires</i> —31 Vict. ch. 52, sec 12, O.	87
_____ v. Irwin.	
Reformation of mortgage—Fraudulent conveyance—Practice—Foreclosure	397
Bartlett v. Jull.	
Mortgage—Power of sale—Insufficiency of notice—Infant	140
Beaver and Toronto Mutual Ins. Co., Bank of Toronto v.	
Mutual insurance company—Debentures for money borrowed— <i>Ultra vires</i> —31 Vict. ch. 52, sec. 12, O.	87
Bell v. Lee.	
Will, invalidity of—Testamentary capacity—Undue influence—Insane delusion—Inoperative will—Costs	150
Bennett, Collard v.	
Fraudulent conveyance—Husband and wife—Statute of Elizabeth..	556

B.

Bixel, Labatt v.

Fraudulent preference—Defending one suit and allowing judgment to go by default in another—Assigning book debts—Exigible property 593

Brackenridge, Campion v.

Sale under power—Agreement to advance money—Pleading—Demurrer 201

Bradford, Greenshields v.

Statute of Limitations—Caretaker—Pleading—Proof of title—Purchase for value 299

Brown, Sayles v.

Altering document—Bona fides 10

Brunker, Little v.

Redemption—Trifling balance due on mortgage—Costs—Appeal from Master—Conflicting evidence 191

Buckner, Moore v.

Arbitration—Award—Jurisdiction—Time for enforcing award—Costs 606

C.

Cameron v. Wellington, Grey, and Bruce R. W. Co.

Farm crossings—Parol agreement—"Make and maintain," construction of 321

Campbell, McGee v.

Insolvency—Fraudulent omission from schedule—Fraudulent intent 308

Campion v. Brackenridge.

Sale under power—Agreement to advance money—Pleading—Demurrer 201

Canada Farmers' Ins. Co., Lowson v.

Fire insurance—Mutual insurance—Ultra vires 552

Canada Southern Railway Co., The, The International Bridge Co. v. and The Canada Southern Railway Co. v. The International Bridge Co.

Bridge company—Tolls—American charter—Canadian charter—Unconditional legislation 114

Canada Southern R. W. Co., Schliehauf and Oxford v.

Railways—Deeds of lands for station grounds—Agreement as to position of station buildings 236

Canavan, Pierce v.

Mortgagor and mortgagee—Purchase of part of mortgaged estate—Liability of purchasers 356

Carrick, Hunter v.

Patent of invention—Infringement of patent 489

Carroll, Neil v.

Mechanics' Lien Act—Lapse of time—Repairing property 30

TABLE OF CASES.

vii

C.

Chamberlain v. Clark.

Mortgagor and mortgagee—Statute of Limitations—Payment of interest—Possession of strangers 454

— v. Sovais.

Judgment creditor—Mortgagor and mortgagee—Principal and surety 404

Clark, Chamberlain v.

Mortgagor and mortgagee—Statute of Limitations—Payment of interest—Possession of strangers 454

Collard v. Bennett.

Fraudulent conveyance—Husband and wife—Statute of Elizabeth.. 556

Cook, Summers v.

Sale of standing timber—Realty or personalty—Lien for unpaid purchase money—Injunction..... 179

D.

Davidson v. Papps.

Partnership—Deceased partner—Insolvency of surviving partners—Assignment to and by executrix of deceased partner..... 91

Denison and Winne, VanKoughnet v.

Demurrer—Covenant against building—Injunction 485

Dewson, Tyrwhitt v.

Will, construction of—Legacy on termination of life-estate 112

Dickson v. McMurray.

Joint stock company—Election of directors—Scrutineers 533

Direct Cable Co. v. Dominion Telegraph Co.

Arbitration—Award—Practice—Cross bill—Umpire, appointment of 648

Doig v. Hathaway.

Injunction—Practice—Irreparable damage—Restraining nuisance—Public nuisance 461

Dominion Telegraph Co., Direct Cable Co. v.

Arbitration—Award—Practice—Cross bill—Umpire, appointment of 648

Dowser, Watson v.

Mortgage—Priority—Unpaid purchase money—Incumbrance 478

Duncombe, Galbraith v.

Executors—Trustee—Setting aside money for special purpose—Principal and surety 27

F.

Ferguson v. Ferguson.

Constructive trustee—Statute of Limitations—Costs 380

F.

Fisken et al., McLaren et al. v.

48 Vict. ch. 58, sec. 3 (D).—Forthwith, meaning of, in Statute—
Meeting of provisional directors—Injunction..... 352

Fletcher et al., Re.

Solicitor and client—Judgment and execution—Summary application 413

Fox v. Toronto and Nipissing R. W. Co.

Receiver—Passing accounts—Unauthorized payments—Allowance
of items paid without authority—Costs 212

Fraser, Vinden v.

Fraudulent conveyance—Chose in action 502

G.

Galbraith v. Duncombe.

Executors—Trustee—Setting aside money for special purpose—Prin-
cipal and surety 27

Gibson, Murray v.

Loan and Savings Society—Treasurer—Manager—Sureties—Li-
ability of co-sureties to contribute—Entries in books—Evidence.. 12

Gilechrist v. Wiley.

Demurrer—Equitable garnishment 425

Gooderham v. Toronto and Nipissing R. W. Co. Fox v.

Toronto and Nipissing R. W. Co.

Receiver—Passing accounts—Unauthorized payments..... 212

Grand Trunk R. W. Co., Jessup v.

Railway Co.—Land acquired on condition of using it for station—
"Place," meaning of—Statute of Limitations 583

Owston, v.

Railway company—Purchase of right of way—Pleading—Cer-
tainty of allegation—Tenant for life 428

Payment for lands taken for road—Pleading—Parties—Demurrer. 431

Grant, In re Alexander, a Lunatic.

Execution creditors—Proving claim against estate of lunatic 457

Greenshields v. Bradford.

Statute of Limitations—Caretaker—Pleading—Proof of title—Pur-
chase for value 299

H.

Halleran v. Moon.

Statute of Frauds—Promise not to be performed within a year—
Executed consideration—Promise to leave money by will—Cor-
roborative evidence 319

Hamilton, School Trustees of Township of v. Neil.

Officers of corporation, irregular appointment of—Payment to.... 408

TABLE OF CASES.

ix

H.

Harrison, Hopper v.	
Practice—General orders 244, 245—Discovery—Relief.....	22
Hathaway v. Doig.	
Injunction—Practice—Irreparable damage—Restraining nuisance	
—Public nuisance	461
Hill v. Merchants and Manufacturers' Ins. Co.	
Mutual insurance company—Receiver—Assessment on premium	
notes	560
Holman, Thompson v.	
Principal and agent—Power of sale—Mortgage—Costs of sale....	35
Holtby v. Wilkinson.	
Will, construction of—Vested remainder—Falsa demonstratio....	550
Hooker v. Morrison.	
Statute of Limitations—Acknowledgment of title—Interruption of	
possession—Mortgage	369
Hopper v. Harrison.	
Practice—General orders 244, 245—Discovery—Relief	22
Horne, Simpson v.	
Administration order—Executors—Costs—Practice—Personal re-	
presentative	1
Hunter v. Carrick.	
Patent of invention—Infringement of patent	489
Hurl, Wood v.	
Construction of statutes—Grouping clauses in Acts—Headings—	
R. S. O. cap. 49, secs. 10 & 11	146

I.

International Bridge Co., The, Attorney-General of Ontario	
ex rel Barrett v.	
Injunction—Bridge company—Railway company—Costs	65
_____ v. The Canada Southern Railway Co.,	
and the Canada Southern Railway Co. v. The Inter-	
national Bridge Co.	
Bridge company—Tolls—American charter—Canadian charter—	
Unconditional legislation	114
Irwin, Bank of Toronto v.	
Reformation of mortgage—Fraudulent conveyance—Practice—Fore-	
closure	397
_____ v. Young.	
Voluntary deed—Independent advice—Costs	511

J.

Jessup v. Grand Trunk R. W. Co.

*Railway Co.—Land acquired on condition of using it for station—
"Place," meaning of—Statute of Limitations* 583

Jull, Bartlett v.

Mortgage—Power of sale—Insufficiency of notice—Infant heir.... 140

K.

Kyle, Wilson v.

*Mortgage, assignment of subject to equities—Payments to mort-
gagee after assignment* 104

L.

Labatt v. Bixel.

*Fraudulent preference—Defending one suit and allowing judgment to
go by default in another—Assigning book debts—Ecigible property* 593

Lario v. Walker.

Conveyance in fee—Repugnant limitations—Pleading—Demurrer.. 216

Laws, Re—Laws v. Laws.

*Husband and wife—Wife's chose in action—Reduction into posses-
sion—Evidence—Statute of Limitations* 382

Lee, Bell v.

*Will, invalidity of—Testamentary capacity—Undue influence—
Insane delusion—Inoperative will—Costs* 150

Leys et al., Webster et al. v.

*Demurrer—Style of cause—Married woman—Administration suit—
Will, construction of—Vested interest*..... 471
..... 475

Leys, Sivewright v.

*Will, construction of—Conversion of realty—Demurrer—Chose in
action—Married woman* 498

Little v. Brunker.

*Redemption—Trifling balance due on mortgage—Costs—Appeal
from Master—Conflicting evidence* 191

London, The City Light and Heating Company of, et al. v.
Macfie et al.

Pleading—Parties—Demurrer 363

Lowson v. Canada Farmers' Ins. Co.

Fire insurance—Mutual insurance—Ultra vires 525

M.

Macfie et al., London, The City Light and Heating Company
of, et al. v.

Pleading—Parties—Demurrer 363

TABLE OF CASES.

xi

M.

	Meadows, Norris v.	
	<i>Mortgages—Sale of lands subject to mortgage—Right to call on purchaser to pay off mortgages</i>	334
	Mearns v. The Corporation of the Town of Petrolia.	
	<i>Municipal councillors—Three months' absence—Computation of time—Want of quorum—Injunction</i>	98
	Merchants' Bank, The, Smith v.	
	<i>Insolvency—Bills of lading—Warehouseman—Warehouse receipts—Mixing goods deposited</i>	629
	— v. Sparkes.	
	<i>Mortgage—Principal and sureties—Proceedings at law and in equity—Complicated debt—Costs</i>	108
	Merchants and Manufacturers' Ins. Co., Hill v.	
	<i>Mutual insurance company—Receiver—Assessment on premium notes</i>	560
	Merritt v. Niles.	
	<i>Fraudulent conveyance—Statute of Elizabeth</i>	346
	Mitchell v. Strathy.	
	<i>Mortgagor and mortgagee—Disputed signatures—Res judicata—Erroneous decree</i>	80
	Moon, Halleran v.	
	<i>Statute of Frauds—Promise not to be performed within a year—Executed consideration—Promise to leave money by will—Corroborative evidence</i>	319
	Moore v. Buckner.	
	<i>Arbitration—Award—Jurisdiction—Time for enforcing award—Costs</i>	606
	Morrison, Hooker v.	
	<i>Statute of Limitations—Acknowledgment of title—Interruption of possession—Mortgage</i>	369
	Murray v. Gibson.	
	<i>Loan and Savings Society—Treasurer—Manager—Sureties—Liability of co-sureties to contribute—Entries in books—Evidence</i> ...	12
	Muskoka Mill Co. v. The Queen.	
	<i>Petition of right—Alleged tortious act of Crown—35 Vict. ch. 13, O.—Practice—Costs</i>	563
	Mc.	
	McCall v. Theal.	
	<i>Trade marks—Injunction</i>	48
	McGee v. Campbell.	
	<i>Insolvency—Fraudulent omission from schedule—Fraudulent intent</i> ...	308

Mc.

- McLaren et al. v. Fiske et al.
 43 Vict. ch. 58, sec. 3 (D.) *Forthwith, meaning of, in Statute—*
Meeting of provisional directors—Injunction 352
- McMurray, Dickson v.
Joint stock company—Election of directors—Scrutinisers 533
- McPherson v. Shannon.
Husband and wife—Fraudulent conveyance—Statute of Elizabeth.. 378
- McTavish, Allan v.
Fraudulent conveyance—Evidence—Res judicata—Ancient docu-
ment 539

N.

- Neil, School Trustees of the Township of Hamilton v.
Officers of corporation, irregular appointment of—Payment to.... 408
- Neill v. Carroll.
Mechanics' Lien Act—Computation of time..... 339
- Nelles v. The Bank of Montreal.
Insolvency—Preferential transfer—Bonâ fide advance to carry on
business..... 449
- Nicholson v. Shannon.
Husband and wife—Fraudulent conveyance—Statute of Elizabeth.. 378
- Niles, Merritt v.
Fraudulent conveyance—Statute of Elizabeth..... 346
- Norris v. Meadows.
Mortgages—Sale of lands subject to mortgage—Right to call on pur-
chaser to pay off mortgage..... 334

O.

- O'Donohoe, Stammers v.
Specific performance—Signature of parties to contract—False state-
ments as to state of property—Compensation..... 207
- Owston v. The Grand Trunk R. W. Co.
Railway company—Purchase of right of way—Pleading—Certainty
of allegation—Tenant for life 423
- Payment for lands taken for road—Pleading—Parties—Demurrer*. 431

P.

- Papps, Davidson v.
Partnership—Deceased partner—Insolvency of surviving partners
—Assignment to and by executrix of deceased partner..... 91
- Petersville, Smith v.
Municipal council—Resignation of candidate after election—Notice
of resignation of seat..... 599

TABLE OF CASES.

xiii

P.

Petrolia, The Corporation of the Town of, <i>Mearns v.</i>	
Municipal councillors—Three months' absence—Computation of time	98
—Want of quorum—Injunction	
Pierce v. Canavan.	
Mortgagor and mortgagee—Purchase of part of mortgaged estate	
—Liability of purchasers	356
Pomeroy, Ross v.	
Revivor—Statute of Limitations—R. S. O. cap. 108	435

Q.

Queen, The, Muskoka Mill Co. v.	
Petition of right—Alleged tortious act of Crown—35 Vict. ch. 13,	
O.—Practice—Costs	563

R.

Rae, Sommerville v.	
Fraudulent conveyance—Contradictory statements—Estoppel—Cor-	
recting deed by grantee after execution	618
Robb, Workman v.	
Fraudulent conveyance—Statute of Limitations	243
Roblin v. Roblin.	
Marriage, conspiracy to bring about when one party intoxicated—	
Subsequent acknowledgment of validity of—Alimony—Undertak-	
ing to receive wife—Costs	439
Ross v. Pomeroy.	
Revivor—Statute of Limitations—R. S. O. cap. 108	435
Russell v. Russell.	
Execution creditor—Registry Act—Purchaser for value without	
notice	419

S.

Sayles v. Brown.	
Altering document—Bona fides	10
Schliehauf and Oxford v. Canada Southern R. W. Co.	
Railways—Deed of lands for station grounds—Agreement as to	
position of station buildings	236
School Trustees of the Township of Hamilton v. Neil.	
Officers of corporation, irregular appointment of—Payment to....	408
Shannon, Nicholson v. Shannon, McPherson v.	
Husband and wife—Fraudulent conveyance—Statute of Elizabeth..	378
Simpson v. Horne.	
Administration order—Executors—Costs—Practice—Personal re-	
presentative	1

S.

Sivewright v. Leys.

Will, construction of—Conversion of realty—Demurrer—Chose in action—Married woman 498

Smith v. The Merchants' Bank.

Insolvency—Bills of lading—Warehouseman—Warehouse receipts—Mixing goods deposited 629

— v. Petersville.

Municipal council—Resignation of candidate after election—Notice of resignation of seat 599

Somerville v. Rae.

Fraudulent conveyance—Contradictory statements—Estoppel—Correcting deed by grantee after execution 618

Sovias, Chamberlain v.

Judgment creditor—Mortgagor and mortgagee—Principal and surety 404

Sparkes, Merchants' Bank v.

Mortgage—Principal and sureties—Proceedings at law and in equity—Complicated decree—Costs 108

Stammers v. O'Donohoe.

Specific performance—Signature of parties to contract—False statements as to state of property—Compensation 207

Stevenson v. Stevenson.

Will, construction of—Land subject to mortgage—Right to redeem given by testator—Costs 232

Strathy, Mitchell v.

Mortgagor and mortgagee—Disputed signatures—Res judicata—Erroneous decree 80

Summers v. Cook.

Sale of standing timber—Realty or personality—Lien for unpaid purchase money—Injunction 179

T.

Taylor in re. Re Lot One, Mississaga Street, Orillia.

Quieting Titles Act—Infancy—Statute of Limitations—Title by possession 640

Theal, McCall v.

Trade marks—Injunction 48

Thompson v. Holman.

Principal and agent—Power of sale—Mortgage—Costs of sale 35

Thomson v. Torrance et al.

Mental capacity—Testamentary capacity—Will obtained by interrogation—Mortmain Acts 253

TABLE OF CASES.

xv

T.

Toronto Harbour Commissioners, Re.

Trustees—Commissioners of government works—Compensation to trustees—Conflict of interest with duty 195

Toronto and Nipissing R. W. Co., Gooderham v. Toronto and Nipissing R. W. Co., Fox v.

Receiver—Passing accounts—Unauthorized payments—Allowance of items paid without authority—Costs 212

Torrance et al., Thomson v.

Mental capacity—Testamentary capacity—Will obtained by interrogation—Mortmain Acts 253

Tyrwhitt v. Dewson.

Will, construction of—Legacy on termination of life-estate 112

V.

VanKoughnet v. Denison and Winne.

Demurrer—Covenant against building—Injunction 485

Vinden v. Fraser.

Fraudulent conveyance—Chose in action 502

W.

Walker, Lario v.

Conveyance in fee—Repugnant limitations—Pleading—Demurrer 216

Watson v. Dowser.

Mortgage—Priority—Unpaid purchase money—Incumbrance 478

Webster et al. v. Leys et al.

Demurrer—Style of cause—Married woman—Administration suit—Will, construction of—Vested interest 475

Wellington, Grey and Bruce R. W. Co., Cameron v.

Farm crossings—Parol agreement—"Make and maintain," construction of 326

Wiley, Giechrist v.

Demurrer—Equitable garnishment 425

Wilkinson, Holtby v.

Will, construction of—Vested remainder—Falsa demonstratio 550

Wilson v. Kyle.

Mortgage, assignment of, subject to equities—Payments to mortgagee after assignment 104

Wood v. Hurl.

Construction of Statutes—Grouping clauses in Acts—Headings—R. S. O. cap. 49, ss. 10 and 11 146

Workman v. Robb.

Fraudulent conveyance—Statute of Limitations..... 243

Y.

Young, Irwin v.

Voluntary deed—Independent advice—Costs..... 511

Abell
 Acre v.
 Acton
 Adams
 Addis
 Aldous
 Aldw
 Alexan
 Allen v.
 Co .
 — v.
 Amhers
 Andersc
 Anon .
 Archer v.
 Ashboug
 Ashbury
 Co. v.
 Asher v.
 Atkin, R
 Attorney
 Attorney.

Co

Tailors'

W. Co

Falls Bri

Gas Co .

Auriol v. St

Ausman, D

Averall v. V

Baddely, Doc

Baker v. Ha

— v. Ste

C—

A TABLE OF THE NAMES OF CASES CITED IN THIS VOLUME.

A.	PAGE	B.	PAGE
Abell v. McPherson	493	Baldwin's Case	219
Acre v. Livingstone	398	Ball v. Ray	463
Acton v. Pierce	420	Bank of Upper Canada v. Shickluna	244
Adams v. Loomis	420	Bank of United States v. Dandridge	409
Addis v. Knight	93	Bank of British North America v. Clarkston	632
Aldous v. Cornwell	11		
Aldworth v. Robinson	111		
Alexander v. Campbell	665	Mallory	458
Allen v. Edinburgh Life Assurance Co	147, 420	Bankers' Case, The	576
— v. England	304, 377	Banks v. Goodfellow	167
Amherst v. Dowling	534	Barfield, In re	416
Anderson v. Thornton	18	Barker v. Goodair	94
Anon	418	Barry v. Butlin	287
Archer v. Hudson	517	Bartlett v. Regan	340
Ashbough v. Ashbough	7	— v. Kingon	345
Ashbury Railway Carriage and Iron Co. v. Riche	530	Bartley, In Re	534
Asher v. Whitlock	223	Bayley, In Re	416
Atkin, Re	416	Beadel v. Perry	103
Attorney, Re	416	Beaven v. Lord Oxford	252, 421
Attorney-General v. Ely	70	Becket v. Micklethwaite	111
— v. The Goldsmiths' Co	110	Becker v. Hammond	612
— v. Magdalen College	223	Beckford v. Wade	642
— v. The Merchant Tailors' Co	110	Beddow v. Beddow	666
— v. Mid-Kent R.	70	Beer v. London and Paris Hotel	211
— v. Niagara Falls Bridge Co	69, 129	Bell, Ex parte, in re Laforest	316
— v. Parker	534	Beman v. Knapp	517
— v. The Sheffield Gas Co	463	Bennett's Trusts, In Re	316
Auriol v. Smith	664	Bessela v. Stern	387
Ausman, Doe, v. Minthorne	244	Bettridge v. Great Western R. W. Co.	237
Averall v. Wade	360	Bevor v. Luck	361
		Bigelow v. Bigelow	551
		Billinghurst v. Vickers	282
		Bilton v. Blakeley	92
		Bingham v. Mulholland	182
		Birmingham v. Kirwan	612
		Bishop v. Nobe	343
		Black v. The Ottoman Bank	16
		Blake, In Re	416
		Bolckow v. Foster	92
		Bond v. Hopkins	229
		Booth v. Booth	551
		Boraston's Case	551
		Borrowdale v. Tuttle	82

B.

	PAGE
Boughton v. Knight	177
Boulnois v. Penke	53
Boulton v. Gillespie	184
Boulton, Doe, v. Walker	305
Boustead v. Shaw	379
Box v. The Provincial Ins. Co.	374
Boys v. Wood	636
Bradley v. London and North-West- ern R. W. Co.	664
Brayton v. Town	29
Briggs v. Sharpe	534
Brine v. The Great Western R. W. Co.	571
Brown v. Fisher	203
— v. Sage	182
— v. Stuart	217, 569
Buck, Re	361
Buckland v. Rose	504, 557
Buckley v. Barber	92
Burdick v. Garritt	645
Burns v. Griffin	183
Buxton v. Lister	187
C.	
Cameron v. Gunn	398
— v. Wigle	429
Campbell, Re	418
— v. Chapman	540
— v. McKay	109
— v. Robinson	407
Canada Landed Credit Co. v. Canada Agricultural Ins. Co.	527
Canada Permanent Building Society v. Young	40, 211
Cannington v. Nuttall	493
Canterbury, Viscount, v. Attorney- General	576
Carew, Re	203
Carridice v. Currie	346, 540
Carroll, Re	416
— v. Fitzgerald	395
Cartwright v. Gray	463
Casselman v. Hersey	571
Catling v. King	211
Catton v. Gillard	53
Chicago, &c., R. W. Co. v. Iowa ..	123
Child v. Comber	211
Chisholm v. Sheldon	420
Cholmondeley v. Clinton	367
Clarkson v. Scott	361
Clark v. Bogart	361
Clarke v. Bonnycastle	570
Cockburn v. Sylvester	633
Coffey v. The Quebec Bank	634
Colborne v. Thomas	183
Coleman, Re	633
— v. Glanville	612
Coles v. Trecothick	211

C.

Cameron v. Gunn	398
— v. Wigle	429
Campbell, Re	418
— v. Chapman	540
— v. McKay	109
— v. Robinson	407
Canada Landed Credit Co. v. Canada Agricultural Ins. Co	527
Canada Permanent Building Society v. Young	40, 211
Cannington v. Nuttall	493
Canterbury, Viscount, v. Attorney- General	576
Carew, Re	203
Carridge v. Currie	346, 540
Carroll, Re	416
— v. Fitzgerald	395
Cartwright v. Gray	463
Casselman v. Hersey	571
Catling v. King	211
Catton v. Gillard	53
Chicago, &c., R. W. Co. v. Iowa	123
Child v. Comber	211
Chisholm v. Sheldon	420
Cholmondeley v. Clinton	367
Clarkson v. Scott	361
Clark v. Bogart	361
Clarke v. Bonnycastle	570
Cockburn v. Sylvester	633
Coffey v. The Quebec Bank	634
Colborne v. Thomas	183
Coleman, Re	633
— v. Glanville	612
Coles v. Trecothick	211

g.

	PAGE
Collins v. Brown	53
Commercial Bank v. Graham	86
Commissioners v. Maysant	29
Commissioners of Cobourg Town Trust, The	196
Commissioners of Public Works v. Daly	570
Constable v. Tuffnell	282
Cooke v. Cooke	665
Cooper v. Hamilton	251
v. Hood	53
Corbett Davies, Re	416
Cornish v. Clarke	541
Cotterell v. Stratton	194
Crawford v. Howard	29
v. Meldrum	346
Creighton v. Rankin	17
Cripps v. Wolcott	113
Crofts v. Fenge	398
Crombie v. Jackson	638
Cronn v. Chamberlin	149
Crooks v. Crooks	418
v. Davis	211
Cross v. DeValle	663
Crossley v. Elworthy	558
Crowthier v. Crowthier	643
Crozier, Re—Parker v. Glover	361
Duff v. Platell	367
Dunningham v. Buchanan	671
Currie, Re	416
v. Gillespie	541

D.

D'Arcy v. Tamar R. W. Co.	352
Davidson v. McInnes	463
v. Ross	463
Davies Corbett, Re	416
v. Appleton	322
Davis' Case	531
v. Bender	183
v. Getty	665
v. Reid	50
v. White	361
Dawson v. Dawson	517
v. Lawes	17
v. Raines	28
v. Sadler	665
Day v. Brown	391
v. Day	250
Deare v. Elwyn	283
DeLafield v. Parish	281
Delesdernier v. Burton	541
Delong v. Mumford	521
Demorest v. Miller	517
Dent v. Bennett	517
Dew v. Clark	177
Dobell v. Hutchinson	213

CASES CITED.

xix

D.

	PAGE
Doe v. Eyre.....	455
— v. Walker.....	455
Ausman v. Minthorne.....	244
Baddley v. Massey.....	375
Boulton v. Walker.....	305
Goody v. Carter.....	373
Groves v. Groves.....	302
Irvine v. Webster.....	361
Meyers v. Marsh.....	218
Palmer v. Eyre.....	372
Perry v. Henderson.....	244
Quincy v. Canniff.....	244
Timmis v. Steele.....	219
Whedon v. Lee.....	553
Doner v. Ross.....	458
Donovan v. Bacon.....	147
Dormer v. Fortescue.....	642
Dougall v. Turnbull.....	420
Douglas v. Ward.....	540
Dublin, Lessee of Corporation of, v. Judge.....	377
Duchess of Kingston's Case.....	85
Duckett v. Gover.....	367
Duggan v. Kitson.....	420
Dunn v. McKee.....	341
Dutton v. Morrison.....	95

E.

Eastern Counties, &c., R. W. Co. v. Marriage.....	147
Eastwood v. Kenyon.....	323
— v. Lockwood.....	602
Eberts v. Eberts.....	6
Ebbs v. Boulnois.....	316
Edelstein v. Edelstein.....	53
Edinburgh and Glasgow R. W. Co. v. Campbell.....	331
Edinburgh Life Assurance Co. v. Barnhart.....	570
Egremont v. Hamilton.....	437
Ellis v. Beaver and Toronto Mutual Ins. Co.....	529
— v. Crawford.....	301
— v. Grubb.....	182
— v. Waddell.....	551
Elwes v. Payne.....	464
Erskine v. Aulsebrook.....	237
Essex Case, The.....	602
Estcourt v. Estcourt.....	53
Everitt v. Backhouse.....	94
Ewart v. Snyder.....	409
Exchange Bank v. Springer.....	668
Eyre v. Everett.....	17

F.

Fairweather v. Archibald.....	612
Faulkner v. Saulter.....	609

F.

	PAGE
Feather v. Regina.....	570
Fentyman v. Smith.....	570
Ferguson v. Baird.....	595
— v. Hill.....	183
Ferrie v. Wright.....	551
Ferris v. Hamilton.....	387
Festing v. Allen.....	551
Fewster v. Turner.....	571
Fisken v. Brooke.....	420
Fitzgibbon v. Duggan.....	420
Flint v. Smith.....	183
Freeman v. Pope.....	557
French v. French.....	545
Frietas v. Dos Santos.....	26
Follet v. Hoppe.....	434
Ford v. Ager.....	375
— v. Foster.....	53
Forsyth, Re.....	417
Foster v. Abraham.....	626
— v. Emerson.....	243
Fowler v. Bailey.....	340
Fox v. Mackreth.....	39
Fursdon v. Clogg.....	377

G.

Gage v. Newmarket Railway Co.....	237
Gale v. Williamson.....	541
Galton v. Emuss.....	203
Gardner v. Gardner.....	386
Garrard v. Tuck.....	223
Garrow v. McDonald.....	474
Gibson v. Goldsmid.....	489
— v. Russell.....	517
— v. Scott.....	345
Gildersleeve v. Cowan.....	409
Gillatley v. White.....	211
Gilmour v. Buck.....	634
Glaister v. Hewer.....	390
Goff v. Lister.....	398
Goode v. Job.....	377
Goodtitle v. Whitley.....	551
Gordon, Ex parte.....	92
— v. The Cheltenham R. W. Co.....	465
Goyeau v. The Great Western R. W. Co.....	584
Graham v. Chalmers.....	398
Grant v. Eastwood.....	607
— v. Eddy.....	220, 431, 664
— v. Grant.....	379
Gray v. Richford.....	584
Great Western R. W. Co. v. Hodgson.....	634
Green v. Skipworth.....	232
Greenwood's Case.....	169
Gregson's Trusts.....	113
G... v. Robins.....	517
G... v. Doe, v. Groves.....	302

G.		I.	
	PAGE		PAGE
Guest v. Smyth	39	Imperial Bank, The, v. Boulton	109
Guillamore, Lord v. O'Grady	176	Imperial Loan & Savings Co., The, v. O'Sullivan	480
Gwinnett v. Bannister	665	Incorporated Society v. Richards....	377
		Irwin v. Freeman.....	541, 568
H.		J.	
Hagley v. West	642	Jackson v. Bowman	560
Halle v. Allnut	351	— v. Lowe	211
Halfhide v. Fenning	664	— v. Yeomans	322
Hamilton v. Houghton	85	Jenkins v. Jones	41
—, Re, v. O'Reilly.....	418	Johnson v. Montreal	366
— v. Royce	360	— v. New River Co.	571
— and Port Dover R. W. Co.		Jones, In Re	316
— v. The Gore Bank	352	— v. Munro	343
Hamblyn v. Betty	667	— v. Reid	609
Haukey v. Garratt	93	— v. Victoria Graving Dock Co.	210
Hartling v. Wickham	606	Jorden v. Money	237
Harrison v. Guest	517	Jull v. Jacobs	551
Hartly v. O'Flaherty	359	Juson v. Reynolds	569
Hart v. Ten Eyck	634		
Harvey v. Hill	416	K.	
Hatton v. Haywood	147	Keenan, Re	147
Hayward v. Whitby	533	Keffer v. Keffer	243
Hazard Powder Co. v. Byrnes	341	Kelly v. Morray	409
Hegarty v. King	287	Kemp v. Mockrell	671
Heming v. Swinnerton	665	Kentucky v. Dennison	102
Henderson v. Harris	377	Ker v. Ker	361
Hesp v. Bell	235	Kerr v. Coghill	570
Heward v. Wolfenden	147	— v. Read	504
Heyland v. Scott	301	Keys, Re—Smith v. Henderson	415
Hill, Re	416	Kidney v. Coussmaker	504
— v. The Bishop of London	534	King of Spain v. Machado	367
— v. Wilson	223	Kingston's (Duchess of) Case	85
Hirschman v. Budd	11	Kipp v. The Synod of Toronto	245
Hiscox v. Lander	571	Kirkham v. Smith	360
Hodges v. Horsfall	486	Kline v. Kline	24
Holden v. Winslow	340	Knight, In re	416
Holditch v. Holditch	612	Kramer v. Glass	397
Hollingshead's Case	437	Krehl v. Burrell	70
Holmes v. Hoskins	182		
Hood v. Lord Barrington	211	L.	
Hook v. McQueen	486	Lampkin v. The Ontario Marine and Fire Insurance Co.	527
Hooker v. Morrison	456	Lane v. Newdigate	103
Hopkins v. The Manufacturers' & Co., Ins. Co	527	Lang v. Kerr	147
Hopwood v. Hopwood	551	Langmead v. Maple	82
Hore v. Becher	420	Lapp v. Lapp	612
Horsley v. Graham	361	Lauder v. Mulock	417
Horsley v. Cox	427	Lavin v. Lavin	520
Hovenden v. Lord Annesley	230, 437, 642	Law v. Ganett	663
Howard v. Earl of Shrewsbury	642	Lawrence v. Hitch	123
Hubbard v. Brown	340	— v. Lawrence	612
Hubbell v. Schreger	341	Lawrie v. Rathbun	634
Hunt v. Bate	323		
— v. Riley	557		
Hunter v. Aikens	517		

CASES CITED.

xxi

L.

	PAGE
Lawson v Laidlaw	500
Leather Cloth Co., The, v. The American Leather Cloth Co.	52
Lechmere v. The Earl of Carlisle	230
Leprohon v. Ottawa	196
Lewellen v. Mackworth	230
Lessee of Corporation of Dublin v. Judge	377
Llido v. Morgan	633
Locke v. Matthews	376
Lockey, In Re	29
— v. Lockey	642
Loftus v. Smith	194
Lord v. Commissioners of Sydney	570
— v. Lord	663
Low v. Smith	476
Lupton v. White	634
Lush v. Wilkinson	604
Lyon v. Home	517

M.

Malmesbury R. W. Co. v. Budd	666
Maitland v. Page	343
Makepeace v. Haythorne	367
Manfield v. Dugard	553
Mann v. Nunn	237
Marcon v. Alling	551
Marsh v. Huron College	79
— v. Kavenford	324
— v. Rainsford	324
— v. Tyrell	283
Marshall v. Green	184
— v. Queensborough	236
Martin v. Martin	285, 534
Mason v. Harris	367
— v. Scott	236
— v. Seney	517
Masuret v. Mitchell	504, 540
Mathers v. Helliwell	337
Maunsel v. Egan	28
— v. The Midland R. W. Co.	666
— v. White	237
May v. Wood	551
Mayer v. Harding	663
Mead v. Ballard	584
Mechanics' Ins. Co. v. Gore District Mutual	527
Melling v. Leak	227
Menzies v. White	283
Merchant's Bank v. Clark	346, 379, 504
— v. Morrison	398
Mersey Dock Trustees v. Gibbs	581
Meyers v. Marsh	217
Meux v. Saegar	482
— v. Smith	481
Middlefield v. Gould	21
Miller, Re	387

M.

	PAGE
Milloy v. Kerr	633
Mills v. Capel	223
— v. Murray	354
Miner v. Gilmour	570
Mitchell v. Gard	286
— v. McGaffey	183
Montgomery v. Southwell	86
Montreal Bank, Re the Imperial Statute and the	551
Morgan v. Holford	211
— v. Morgan	231, 642
Morly v. White	92
Morton v. Nihan	379, 558
Munn v. Illinois	130
Munro v. Butt	33
Murphy v. Murphy	113, 612
Murray v. Clayton	491

Mc.

McCarthy v. Oliver	185
McConnell v. McConnell	517
McDonald v. McDonald	183
— v. McIntosh	244
— v. McKinnon	228
— v. Reynolds	147
McEdwards v. Ross	379, 387, 391
McGill v. Courtice	8
McGregor v. McGregor	612
McGuire v. McGuire	467
McIntyre v. Canada Company	244
McKay v. Douglas	557
McKenna v. Smith	596
McLaren v. Caldwell	464
McLean v. Burton	182
McLennan v. Grant	612
— v. McLean	358
McMurray v. Northern R. W. Co.	366
— v. Spicer	211
McNeil v. Keleher	182
McQueen v. The Phoenix Ins. Co.	527
McTaggart v. Watson	17

N.

National Permanent Benefit Building Society, In Re	532
Nelles v. Paul	453
Nicholls v. Nordheimer	322
— v. Watson	361
Nichols v. Chalie	665
— v. Roe	665
Nicholson v. Dillabough	398
— v. Drury	387
Nolan v. Fox	551, 626

CASES CITED.

	PAGE	R.	PAGE
O'Connell v. McNamara	85	Rankin v. Huskisson.....	103
O'Day v. Black	551	Raphael v. Thames Valley R.W. Co.	70, 236
Off v. Off	386	Rathbun v. Culbertson	147
Osborne v. Rogers	324	Regina ex rel. Bugg v. Bell	60
Oswald v. The Mayor of Berwick	18	— v. Cowan	601
Owen v. Thomas	211	— v. McMullen	602
Owston v. Williams	217	— v. Pringle	17
		— v. Ritson	11
P.		— v. Tewkesbury	602
Packham v. Gregory	476	Reynell v. Luscombe	605
Palmer v. Thornbeck	377	Rice v. Bryant	379
Panton v. Williams	283	Richards v. Richards	387
Parfitt v. Lawless	517	Ridgeway v. Wharton	211
Parke v. Riley	420	Rhodes v. Baker	188
Parker v. Glover	337, 361	— v. Bate	517
Parkes, Ex parte	184	Ringland v. Loundes	663
— v. Steven	403	Roberts v. Rees	337
Parsons v. Gooding	458	Robertson v. Lookie	142
— v. The Citizens' Ins. Co	527	Robinson, Re	415
— v. The Standard	527	— v. Grave	569
— v. Victoria Mutual Ins. Co	527	Roddy v. Lester	607
Passingham v. Sherborn	628	Rolph v. The Upper Canada Building Society	25
Patrick v. Sylvester	497	Ross v. Chester	283
Peck v. Buck	358	Royal Canadian Bank v. Miller	632
Peik v. Chicago and North-Western R. W. Co.	132	— v. Mitchell	504
Pender v. Lushington	534	— v. Ross	634
Penney v. Watts	474	— v. Yates	19
Penny v. Allen	231	Ruffin, ex parte	97
Pentland v. Stokes	230	Rush, Re	416
Pentney v. The Lynn Faving Commissioners	467	Rutherford v. Rutherford	183
Perry v. Jenkins	435	Ruthven v. Ruthven	476
— v. Truefitt	58	Ryland v. Smith	390
Perse v. Perse	541		
Peto v. The Brighton, &c., R. W. Co	488	S.	
Petre v. Petre	645	Sale v. Lambert	211
Philp's Will, In re	476	Samuel v. Berger	53
Phipps v. Akers	551	— v. Howarth	17
Phosphate of Lime Co. and Austin, Re	352	Samis v. Ireland	1-7
Pigot's Case	11	Sanders v. Sanders	278
Poole, Ex parte	416	Sayles v. Brown	34
Portarlington, Lord, v. Soulbly	664	Scadding v. Balkam	512
Potter v. Dunfield	211	Scorell v. Boxall	188
Fybus v. Gibb	18	Seven Oaks, Maidstone, and Tunbridge R. W. Co. v. London, Chatham, &c., R. W. Co	331
		Shannon v. The Hasting's Mutual Ins. Co	527
Q.		Shaw, Re	460
Queen, The, v. The Commissioners of Woods and Forests	581	Shelly v. Nash	203
Quinton v. Frith	641	Shipwright v. Clements	53
		Shrewsbury School, In re	534
		Siddons v. Short	569
		Simpson v. Hartman	217, 569
Randall v. Stevens	303, 377	Singer Machine Manufacturing Co. v. Wilson	50
Ranelagh v. Melton	663		

CASES CITED.

22

xiii

	PAGE		PAGE
Skelton v. Cole	211	Townsend v. Westcott	541
Skillot v. Fletcher	19	Tracy v. Lawrence	142
Smee v. Smee	169	Trent Navigation Co., The, v. Harley	17
Smith, Ex parte	93	Trevivan v. Lawrence	82
— v. Drew	483, 612	Trimlestown, Lord, v. D'Alton	175
— v. Henderson	418	Truesdell v. Cook	244
— v. Hudson	182	Turner v. Doe dem. Bennett	376
— v. Hutchinson	463	Tyrwhitt v. Dawson	476
— v. Rowe	8		
— v. Surman	184		
— v. The Dublin and Bray R.	236		
W. Co.	50	V.	
— v. Woodruff	633	Van Norman v. McCarthy	147
Snarr v. Smith	464	VanSittart v. VanSittart	386
Soltan v. DeHeld	307		
Spain, King of, v. Machado	416		
Sparks, Re	21	W.	
Stephen v. Gwynnapp	416	Wakefield v. The Llanelly R. W.,	663
Stephens v. Hill	470	&c., Co.	97
St. Helen's Smelting Co. v. Tiffing	464	Walker, Ex parte	551
St. Michael's College v. Merrick	427	— v. Mower	521
Stockton, &c., R. W. Co. v. Brown	237	— v. Smith	409
Stoddard v. Nelson	602	— v. Symonds	390
Stoddart v. Stoddart	386	Wall v. Tomlinson	584
Stokes v. Clendon	110	Wallace v. Great Western R. W. Co.	217
Stratford v. Twyman	45	Waleh v. Trovanion	605
Stretton v. Stretton	360	Ward v. Periam	211
Stronge v. Hawkes	186	Warner v. Willington	622
Stukeley v. Butler	5	Washburn v. Ferris	165
Sullivan v. Sullivan	491	Waterhouse v. Lee	420
Summers v. Abell	453, 633	Waters v. Shade	203
Suter v. Merchants' Bank	296	Watson v. James	346
Swinfen v. Swinfen		Webb v. VanZandt	211
		Welford v. Beazley	323
		Wonnall v. Adney	476
		West v. Miller	571
		Weymouth v. Nugent	416
		White, Re	595
		— v. Lord	431
		— v. Smale	570
		Whitehead v. Parke	420
		Wightman v. Fields	534
		Wilcox, Re	628
		Wilding v. Borden	82
		Wilkinson v. Kirby	663
		Willesford v. Watson	211
		Williams v. Jordan	420
		— v. Reynolds	225
		— v. Williams	633
		Wilmot v. Maitland	420
		Wilson v. Corby	236
		— v. Furness R. Co	
		— v. Northampton and Bunbury	
		R. W. Co.	
		— v. Wilson	584
		Winterbottom v. Lord Derby	595
		Witt v. Corcoran	663
		Wood v. Wand	571

W.		Y.	
	PAGE		PAGE
Wood v. Wood	147	Yates v. The Great Western R.W. Co.	492
Woods v. Hyde	142	Yersley v. Flanagan	340, 345
Woodward v. Woodward	386	Young v. Christie	596
Wright, Re	416		
Wyatt v. The Bank of Toronto	185		

REPORTS OF CASES
ADJUDGED IN THE
COURT OF CHANCERY,
OF
ONTARIO,
DURING PORTIONS OF THE YEARS 1880 AND 1881.

SIMPSON V. HORNE.

Administration order—Executors—Costs—Practice—Personal representative.

Where an executor by his misconduct in the management of an estate, causes a suit, and but for the fact of the suit having been brought the assets would have been dissipated, the Court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; and where in such a case the party interested filed a bill without calling upon the executor for an account, or affording him any opportunity of shewing that his dealings were correct, the Court (SPRAGGE, C.) refused the costs of the suit to either party up to the hearing, but directed the executor to pay the costs subsequent to the hearing.

An order may be obtained, under the General Orders, for the administration of the personal estate of a testator, by the personal representative of a legatee, as well as by the legatee himself.

This was a suit for the administration of the estate of the late *William Simpson*, of the township of Oro, deceased. The bill was filed by *Ezra Simpson*, son of the testator, against *Thomas Horne*, the executor who had proved the will, and the several persons interested in the estate, whose residences were known, alleging that the testator had duly made and published his will

Statement.

1880. on the 31st day of May, 1866, whereby amongst other
Simpson bequests he gave all his personal estate of what nature
v. Horne. or kind soever to his wife absolutely, and devised all
his real estate to her for life, and on her death to his
youngest son, the plaintiff, charged with certain legacies.
And the testator authorized and empowered his execu-
tors in the event of the non-payment of any of the
legacies thereby given, to raise, by sale or mortgage of
all or any portion of the said real estate, such sum as
might be necessary to pay such legacy or legacies, and
all costs, charges, and expenses incurred by his execu-
tors.

The bill further stated that the testator's widow,
Anne Simpson, died on the 22nd December, 1875, in-
testate; and that on the 20th day of February, 1877,
letters of administration of her estate and effects were
duly granted and issued to the plaintiff.

Statement. The bill also stated that after the death of the said
testator *William Simpson* the defendant *Horne*, as
his executor, took possession of all the personal estate
of the said testator, and which, under his will, passed
to the said *Anne Simpson*, and retained such posses-
sion, alleging that all the personal effects would be
required to pay debts and funeral expenses, and that
such personal estate, by the terms of the said will,
after payment of the testator's debts and funeral
expenses, and the sum of \$20 to the defendant *Horne*,
belonged to, and became the property of the said
Anne Simpson; and charged that *Horne*, at the time
of the decease of *Anne Simpson*, had, and continued
to have, possession of, or had converted to his own
use, a large amount of personal property belonging to
her; and that he, by the means and under the circum-
stances stated, had perpetrated a gross fraud upon the
said *Anne Simpson* and her estate; and prayed that
Horne might be ordered to bring in accounts shewing
his dealings with the estate of the said *Anne Simpson*,
and for an administration of her estate.

The cause having come on for hearing, a decree was made referring it to the Master at Barrie to take the usual accounts, and make the usual inquiries, reserving further directions and costs. In pursuance of such decree the said Master on the 13th of May, 1880, made his report, finding, amongst other things, that *Anne Simpson* had survived her husband the testator; that the defendant *Horne* had, in the lifetime of *Mrs. Simpson*, taken possession of the personal estate of the testator for the purpose of administering it, such personal estate amounting to \$2,109.33, and had properly expended thereout \$1,449.31, leaving a balance due from him on that account of \$660, and that creditors' claims had been sent in, pursuant to advertisement, amounting to \$119.39; that the said Master disallowed to *Horne* any compensation beyond \$20 given him by the will for his personal services in the management of the said estate because of his mismanagement thereof: that *Horne*, by his account brought in, shewed that he had sold the stock-in-trade of the testator to one *Charles Morgan* for \$1,550 (being upwards of \$150 less than the cash value placed thereon by valuers employed by *Horne*) such \$1,550 being payable in five annual instalments, without interest, on indorsed promissory notes; and that the plaintiff by his surcharge claimed that *Horne* should be charged with \$450 as the difference between the amount offered by one *Gilbert Bell* for such stock, which surcharge of the plaintiff was sustained in this, that the said *Bell*, prior to the sale of the goods to *Morgan*, offered to purchase such stock for a large cash payment, and the balance in six months, and that *Horne* had agreed to allow *Bell* an opportunity of inspecting and valuing the stock to enable him to make a definite offer therefor, but *Horne* did not accept such offer, neither did he afford *Bell* an opportunity of inspecting and valuing the stock, but subsequently sold the same as above stated to *Morgan*; and that having made that sale on a credit which,

1880.

Simpson
v.
Horne.

Statement.

1880.

Simpson
v.
Horne.

Statement.

under the circumstances, he was not justified in making, as he ought to have sold for cash or on a credit that would have enabled him to meet the outstanding liabilities, so that there would not have been any necessity for paying the costs and interest on creditors' claims amounting to \$171.66, which he did pay and claimed by his account; and the Master therefore disallowed to him the costs so paid, and any interest after six months from the date of probate; and the Master charged him with \$1,550, as having been received at six months after the testator's death. The Master further reported that *Horne* had claimed that over and above such stock-in-trade he had only collected \$70.54, against which the plaintiff filed two surcharges, and the Master found that *Horne* had received on account of moneys due the estate exclusive of the purchase money of the said stock, and was chargeable with, \$414.93, of which sum *Horne* had \$395.77 in his hands before proceedings had been taken to compel payment of any debts of the testator, and before he had paid any thereof. The Master further stated that *Horne* had, on the reference, claimed \$359.18 as interest paid by him on a mortgage effected on his own property in order to raise money wherewith to pay debts of the testator; but the Master found that in consequence of *Horne's* mismanagement of the estate he had been obliged to create such mortgage so as to raise money to meet such liabilities, when, with ordinary care, there would have been sufficient to pay all, and therefore he had disallowed *Horne's* claim for such sum of \$359.18; and that *Horne*, as charged in the plaintiff's bill, had placed the said personal estate at about \$400 below its real value, when he was aware at the time that it was more.

The Master further found that *Horne* did not intend to defraud the estate, although he did make a false statement as to the amount thereof, and shewed great carelessness and want of management in and about the

said estate, and that under the circumstances the plaintiff was justified in filing the bill. The Master further reported that *Horne* had, after the filing of the bill, offered to prepare, and did, two months after, prepare and furnish to the plaintiff an account of his dealings with the said estate, and offered to vouch the same, and submit to a decree, provided the charges of fraud in the bill were dropped, and which account was the same as that afterwards filed by him in the Master's office; and that *Horne*, by the account brought in by him, claimed that the estate was indebted to him in the sum of \$10.53.

1880.
Shapson
v.
Horne.

The cause coming on to be heard on further directions,

Mr. *Mulock*, for the plaintiff, asked for a decree for payment of the amount found due by the Master's report; and that *Horne* should be ordered to pay the costs of the suit, his mismanagement of the estate having necessitated the proceeding; and the Master having, by his report, found that the plaintiff had been justified in bringing the suit. Argument.

Mr. *G. W. Lount*, for the adult defendants other than *Horne*.

Mr. *Hoskin*, Q. C., for the infant defendants.

Mr. *McCarthy*, Q. C., for the defendant *Horne*.

Tiffany v. Tiffany (a), *Sullivan v. Sullivan* (b), were referred to.

The other facts appear in the judgment.

SPRAGGE, C.—The principal question is as to the costs. Sept. 1st.
The executor contends that the suit should have been by administration order. The plaintiff contends that

1880. the orders do not apply to his case; that while they apply to a legatee they do not apply to the personal representative of a legatee, which he is.

Simpson
v.
Horne.

Judgment.

I do not know that the question has arisen, or that any order has been made in such a case, but orders have been made upon the application of assignees of creditors, though creditors only, not their assignees, are named in the orders, and I think this is right; and I can see no possible reason why if a legatee may obtain such order his representative should not. The orders specify what classes of persons may apply, and the personal representative of a legatee falls as much within that class as the legatee himself; and this is the construction, according to Mr. *Daniell* (a), put upon the analogous orders in England. He says: "The general rules as to the persons by and against whom a suit may be instituted, the parties to a suit * * apply, subject to the qualifications as already pointed out, [which do not touch this case,] to suits commenced by summons, as well as to suits commenced by bill." I should be sorry to place a narrow construction upon our orders while a more reasonable construction has been placed upon the analogous orders in England. There is, I think, nothing alleged in the bill, and certainly nothing is contained in the report, which the plaintiff would not have been entitled to bring before the Master and before the Court under an administration order. I refer to, without repeating the opinion I expressed on this point in *Eberts v. Eberts* (b).

This would limit the plaintiff to the recovery of any costs, beyond such costs as he would be entitled to upon summons and order for administration. But I am disposed to go further, on account of the charge of fraud contained in the 14th paragraph of the bill. Reading the charges contained in the preceding paragraphs from the 8th to the 13th, we find in them a

(a) *Daniell's Prac.* 5th ed. 1073.

(b) 25 Gr. 565.

statement of the plaintiff's grounds of complaint against the defendant's administration of the estate. What follows in the 14th paragraph was entirely unnecessary: "The plaintiff submits that by the means and under the circumstances aforesaid, the defendant *Thomas Horne* has perpetrated upon the said *Anne Simpson*, and upon her estate, a gross fraud." Mr. *Mulock* says, that the preceding paragraphs of the bill shew what, and what only the plaintiff means by this; but it may well be understood to mean that what he did he did fraudulently; and it is at any rate a gratuitous and offensive allegation, not necessary to the plaintiff's case, not sustained in evidence, and negatived by the Master's report. In saying this I do not at all controvert what I said in *Ashbough v. Ashbough* (a). I may add, that the rule that the Master may, and upon a proper case ought, to report any matter bearing upon the question of costs, has a bearing upon both the points to which I have adverted.

1880.

Simpson
v.
Horne

Further it is a fact in the case, that the plaintiff made no demand upon the defendant for an account before filing his bill. It is probable that if he had, it would not have been productive of any good result; but the plaintiff was not to assume this; and it was reasonable before entering upon litigation to give the defendant an opportunity of accounting for his administration of the estate. Looking at the defendant's answer, and at what appeared and occurred in the Master's office, it seems not at all probable that the making of such a demand would have led to a settlement without suit; but it would probably have led to a preparing of accounts, and to a reference by consent to the Master to take the accounts. Upon these several grounds I think this is a proper case for giving no costs to the plaintiff up to the taking of the accounts; and, on the other hand, I give no costs to the executor up to the same period.

Judgment

1880.

Simpson
v.
Horne.

As to the subsequent costs, I still think, as I thought in *Smith v. Rowe* (a), that the rule enunciated in *Tebbs v. Carpenter* (b) is a sound one, that "if a suit would have been proper and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay all the costs of that suit, though in the course of the suit it appears he has misconducted himself; but if the misconduct of the executor was the sole occasion of the suit, he ought then to pay the costs."

In a subsequent case, *McGill v. Courtice* (c), the late Vice-Chancellor Mowat held, "that if executors by their unfounded claims, or by their supineness, negligence, or other misconduct, occasion an administration suit to be brought, they *prima facie* subject themselves to liability for the general costs of it," and in this I entirely concur.

Judgment.

I do not at all agree that where by the proceedings in the suit the estate obtains all that it is entitled to, and is thereby placed in as good a position as if the executor had done his duty in the management of the estate, and in keeping proper accounts, the executor is, because such a result has been obtained, entitled to his costs, or necessarily excused from the payment of costs. Such a rule would not be a sound one, for if the executor had managed the estate and kept his accounts properly the result, it is to be assumed, as a general rule, would have been obtained without suit. Where this result has, through the fault of the executor been obtained only by means of litigation, and without it could not be obtained, it would be most unjust to compensate the executor for his costs out of the estate; and I see no good reason in such a case for stopping short and merely withholding costs from the party in fault. If his fault has occasioned the costs which the plaintiff has been put to, there is no reason why the estate should be diminished by having taken out of it the costs incurred in getting at its rights.

(a) 11 Gr. 321.

(b) 1 Madd. 290.

(c) 17 Gr. 275.

I must in this case reiterate my opinion that the principle stated in *Tebbs v. Carpenter* is the sound one; and certainly there is less hardship in applying it in this country, where an executor doing his duty to the estate he represents is allowed a fair compensation for his pains and trouble; a compensation of which he is not deprived unless there be serious misconduct or mismanagement on his part. I would not however apply the rule in *Tebbs v. Carpenter* too rigidly. We have to remember that the class from which executors in this country are largely drawn are men with little acquaintance with, and many of them with little aptitude for business; and are often chosen for other reasons than their business capacity. Where they manage the estate carefully as well as conscientiously, I should not apply the rule. With this qualification (if it can be called a qualification) I should apply the rule enunciated in *Tebbs v. Carpenter*.

1880.

Simpson
v.
Horne.

Applying that rule to this case there is little to be said. The dealing of the executor with the stock of goods of the testator, as found by the report, was simply unaccountable. The Master finds his management of the estate to have been careless, and in this instance it seems to have been perverse; and if not corrected by the Master would have entailed upon the estate considerable loss. [The CHANCELLOR here read the portions of the Master's report above set forth, referring to the sale of the testator's stock in trade, and the management of the estate.]

The result has certainly been a very unfortunate one for the executor, and one cannot but regret that he suffered such serious loss. But there has been a sufferer by his bad and careless management of the estate, for whom more sympathy is due. The widow of the testator lived and died without obtaining from her husband's estate the benefits to which she was entitled, and which benefits have been got from the executor only after great trouble and expense, as well as litigation.

1880. In my opinion this case is one in which the costs subsequent to the decree should be paid by the executor.

SAYLES V. BROWN.

Altering document—Bona fides.

A mortgagee executed a statutory discharge, which was incorrectly dated; and his agent in good faith, and in order to make the instrument conform to the intention of the mortgagee, altered the date, which alteration was, under the circumstances, immaterial; and, as altered, the document stated correctly what was intended by the parties to it. Under these circumstances a bill impeaching the validity of such discharge was dismissed, with costs.

Statement. This suit was instituted by the widow and administratrix of the late *Francis Sayles* upon a mortgage executed by the defendant *Brown* to *Sayles*, who died 22nd March, 1879. It appeared that after the decease of her husband Mrs. *Sayles* had employed one *Duncombe*, a Solicitor, residing at Simcoe, in transacting her business, in the course of which he had persuaded her that it was necessary to obtain a renewal of that mortgage, and for that purpose obtained her signature to a discharge of mortgage in order, as he said, to procure the renewal mortgage. Instead of this, however, he effected a loan with the defendant *Lowe* for \$1,400, which he advanced upon a mortgage executed by *Brown* for that amount, and out of this advance the amount due on Mrs. *Sayles's* mortgage was handed over to *Foley*, a clerk of *Duncombe's*, which he deposited to the credit of *Duncombe*, who about three weeks afterwards left the country without paying it to Mrs. *Sayles*. When the discharge was taken to Mrs. *Sayles* to execute, it was dated in "September," and the witness to her signature, *Foley*, swore that he altered it to "August," in her presence, after she had executed it.

It being afterwards discovered that Mrs. *Sayles* had not obtained letters of administration in August, the date was then altered back to "September," and in that state it was taken to the Registry Office, and duly registered.

1880.
Sayles
v.
Brown.

Duncombe, having absconded, the present suit was instituted to compel payment of the mortgage, the plaintiff insisting that the alteration of the date in the manner stated had the effect of invalidating the discharge.

The case came on for hearing at the sittings at Simcoe, on the 17th May, 1880.

Mr. *Smyth*, for the plaintiff.

Mr. *Boyd*, Q. C., for the defendant *Brown*.

Mr. *Robb*, for the defendant *Lowe*.

BLAKE, V. C.—At the hearing of this cause I decided Judgment. that the defendants were entitled to succeed, unless the alterations in the discharge of the mortgage prevented the instrument from being operative. The agent of the party who signed the discharge, without fraud, and to make it conform to the intention of this party, altered its date. It is admitted that, under the circumstances, the alteration was not material, and that, as altered, the instrument displayed truly what was intended by the parties to it. *Regina v. Ritson* (a), *Aldous v. Cornwell* (b), *Hirschman v. Budd* (c), cited to me, and overruling *Pigot's Case* (d), are conclusive in favour of the validity of this instrument. The bill must, therefore, be dismissed, with costs.

(a) L. R. 1 C. C. R. 200.

(c) L. R. 8 Ex. 171.

(b) L. R. 3 Q. B. 573.

(d) 11 Rep. 27.

1880.

MURRAY V. GIBSON.

Loan and Savings Society—Treasurer—Manager—Sureties—Liability of co-sureties to contribute—Entries in books—Evidence.

A loan and savings society appointed *G.* their treasurer; and the plaintiffs and defendant by two separate bonds became sureties for the due discharge of the duties of such officer. By several Acts of the Legislature the society was incorporated, and its powers materially increased, and *G.* appointed its manager, the duties of which it was shewn were similar to those of treasurer, the name of manager being given simply as one of honour, and did not involve any additional duties. *G.* made default in his office, and a suit was instituted by the society against all the sureties, which was compromised by the plaintiffs paying about one-half of the sum claimed by the society.

Held, that the defendant was bound to contribute his share of the money so paid, and that the change in the name of the officer afforded no defence to the claim of the plaintiffs.

Held, also, that in such a case the entries of *G.* in the books of the society were not evidence against the sureties during the lifetime of *G.*

This suit was instituted by *Adam Murray*, *Charles Murray*, and *John Elliott*, to enforce contribution or payment by the defendant *Purkis* of his share of the moneys paid by the plaintiffs under a bond entered into by him, as co-surety with the plaintiffs for the defendant *Gibson*.

Statement. The bill set forth that in April, 1870, the Huron and Erie Loan and Savings Society had appointed *Gibson* to the position of treasurer of the society, and required him, before entering on his duties, to give security, himself in the sum of \$8,000, and sureties for a similar amount, for the just and faithful performance of the duties which would devolve upon him as treasurer. On the 6th August, 1870, *Gibson* delivered to the society his own bond for the sum of \$8,000, and on the 8th of the same month, the defendant *Purkis* gave his bond for the sum of \$4,000, and the plaintiffs their joint bonds for a like sum, and thereupon

Gibson entered on his duties as treasurer of the society, 1880. and so continued until April, 1878.

The bill further alleged that *Gibson*, while acting as treasurer, applied to his own use certain sums of money belonging to the society, and incurred losses by discharging a mortgage before receiving the money secured thereby, and also by over-paying a borrower from the society; that the society in December, 1878, filed a bill seeking to compel the sureties to pay the balance found due to the society by *Gibson*, which amounted to about \$5,500; that on the 31st of that month, the plaintiffs paid to the society the sum of \$2,840.48, which was accepted in full satisfaction of the balance claimed as due from *Gibson*; and that the plaintiffs had instituted the present suit to compel *Purkis* to pay them his share, being one half of the sum so paid by the plaintiffs.

The defendant *Purkis*, in his answer, stated that the society had allowed *Gibson* to enter on his duties as treasurer before receiving from him any security for the faithful performance thereof, which was contrary to the rules of the society. He admitted, however, having become surety to the society in a bond for the sum of \$4,000, but claimed that the appointment of *Gibson* was, according to the rules, an annual one, and that *Gibson* having performed his duties faithfully for the one year, his, *Purkis's*, liability as bondsman had ceased. The answer further set forth that he had become surety for *Gibson* as treasurer only, but that subsequent to the execution of his bond, the company had become incorporated by Statute, 39 Vict. ch. 95, O., as "The Huron and Erie Loan and Savings Society," and appointed *Gibson* manager thereof, in which position his duties were materially altered, and the defendant's risks as surety increased without his knowledge or consent; that the company had rules in force for the periodical examination and audit of all books, securities, and moneys, which rules were not complied

Murray
v.
Gibson.

Statement.

1880.

Murray
v.
Gibson.

with; and that sometime subsequent to the execution of his said bond, the Company became aware that *Gibson* was a defaulter, which information was not communicated to the defendant, but it was agreed between the society and *Gibson* that he should make good to them the amount of such defalcation, and he was thereupon continued by the society as "treasurer;" and if previously liable for any defalcations, the defendant submitted he was not so subsequently to the arrangement made between the society and *Gibson*. The defendant further asserted that before any payment was made to the society by the plaintiffs, they were aware that he repudiated any liability to the society; and that the payment so made was voluntary and without the knowledge of defendant; and the plaintiffs were therefore not entitled to any relief in the premises.

Statement. The defendant also submitted that as his bond to the society had been executed before the making and coming into force of the Acts 37 Vict. ch. 50, O., 40 Vict. ch. 48, C., 39 Vict. ch. 32, O., and 40 Vict. ch. 22, O., whereby the powers of the said society were greatly enlarged, and of which powers the society availed itself, and thereby the duties and general liability of *Gibson* were greatly increased, and the risk and liability to loss by the defendant also greatly increased without his consent; and that up to the time of the society so availing itself of such increased powers, *Gibson* performed all his duties as such treasurer of the society, and therefore he, the defendant, was discharged from all liability as surety under said bond.

The defendant *Gibson* also answered the bill, admitting substantially the allegations thereof.

The cause having been put at issue came on for hearing before the Chancellor at the sittings of the Court at London in the Autumn of 1879.

Mr. *Boyd*, Q. C., and Mr. *Meredith*, Q. C., for the plaintiffs.

Mr. Bethune and Mr. Walker, for the defendant *Purkis*. 1880.

Murray
v.
Gibson.

The defendant *Gibson* did not appear.

The only question argued at any length, was the effect upon the liability of the defendant *Purkis*, of the change of name of the office held by *Gibson*, the plaintiffs insisting that the duties were precisely those previously discharged by *Gibson*, and the liabilities of his sureties were not increased to any extent whatever.

The other facts are stated in the judgment.

SPRAGGE, C.—This bill is by sureties against a co- August 31st.
surety for contribution.

The bond of the defendant, dated 8th August, 1870, is to the Huron and Erie Saving and Loan Society; and, after reciting that *Lawrence Gibson* had been appointed treasurer of the society, it is conditioned that *Gibson* shall, from time to time, so long as he shall hold the office of treasurer, duly account for all moneys which shall come to his hands, either in the capacity of treasurer of the society or by any other means, on account of the society, and in every other respect justly and faithfully perform and discharge the duties and obligations which, from time to time, shall devolve upon him in such capacity. Judgment.

By-law XI, in force at that date, provided that a treasurer should be appointed who should also perform the duties of secretary, and who should be empowered to receive and pay all moneys for and on behalf of the society. A by-law, passed after the appointment of *Gibson*, runs thus: "A treasurer shall be appointed, who shall be manager of the company, and who, with such assistance as may be required, shall also perform the duties of secretary;" and it gives to him the same

1880. duties as the previous by-law—to receive and pay all moneys for and on behalf of the company. It is in evidence that *Gibson's* duties under the second by-law were the same, or substantially the same, as under the first by-law; that the name of manager was given as one of honour only, and did not involve any additional duties.

Murray
v.
Gibson.

It is also in evidence that the supervision exercised by the company over its treasurer was loose and negligent; and this is made a ground of defence to the plaintiffs' suit.

In the case of *Black v. The Ottoman Bank (a)*, in the Privy Council, one *Pisani* was agent or broker of the bank, and *Black* was his surety by bond to the bank for his honest and faithful discharge of the duties of his office. The bank brought suit against *Black*, alleging misappropriations by *Pisani* of moneys received by him in his office. The defendant pleaded for his fifth plea as follows: "And further, I say that the officers of the said bank were guilty of negligence and want of due care in checking and properly examining the accounts of the said *Pisani*, and in requiring payment from time to time of the moneys received on its behalf; and that by and owing to such negligence and want of care, as aforesaid, the default alleged in the petition arose, whereby I was released and discharged."

Judgment.

This plea goes certainly to the full extent of what has been pressed in this case in the way of want of due supervision and of negligence. The plea was demurred to as bad in substance, and the demurrer was sustained.

The judgment was delivered by Lord *Kingsdown* who observed: "The terms of the plaintiffs' demurrer, as it is called, shew that they do not admit the supposed duty, for they insist that no such duty is imposed by the bond. The question, therefore, is, whether this

(a) 15 Moore P. C. C. 472.

obligation is to be implied by law, it clearly not being expressed in the bond. The principles applicable to the case seem to be quite established by the authorities referred to in the argument: *The Trent Navigation Co. v. Harley* (a), *Mactaggart v. Watson* (b), *Dawson v. Lawes* (c); to which may be added the authority of Lord Eldon, in the cases of *Samuel v. Howarth* (d), and *Eyre v. Everett* (e); and of Lord Cottenham, in *Creighton v. Rankin* (f). From these cases it is clear that, upon the point now in dispute, the rule at law and in equity is the same; that the mere passive inactivity of the person to whom the guarantee is given—his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him—does not discharge the surety; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as, in the language of *Wood, V. C.*, in *Dawson v. Lawes*, 'to imply connivance and amount to fraud.' The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty."

1880.

Murray
v.
Gibson.

Judgment.

There are several other cases establishing the same principle, but the law is so clearly enunciated by Lord Kingsdown, in the judgment from which I have quoted, that it is unnecessary to refer to others. Several of them are summarized in the judgment of *Wilson, J.*, in *Regina v. Pringle* (g). This ground of defence, in my judgment, fails.

Another ground of defence is, that, after the giving of the bond of suretyship, the duties of *Gibson's* office were materially altered and added to, and the risk of

(a) 10 East 34.

(c) 1 Kay 280.

(e) 2 Russ. 381.

(b) 3 Cl. & Fin. 525.

(d) 3 Mer. 272.

(f) 7 Cl. & Fin. 325.

(g) 32 U. C. R. 308.

1880. the surety thereby increased. It is objected that this alleged change of, and addition to duties is not sufficiently alleged in the answer, and *DeColyar*, p. 270, and the case of *Anderson v. Thornton* (a), are referred to. The answer does not point out the particulars of the alleged changes and additions; and, in strictness, I incline to think this ground of defence not well taken.

Murray
v.
Gibson.

Judgment.

But, at any rate, I do not think that there has been any such material change in, or addition to the duties of the office as will entitle the surety to be discharged. The terms of the bond are comprehensive; he is duly to account for all moneys that shall come to his hands, not only as treasurer, but also "by any other ways or means, on account of the society," and there are the added words, that he shall "in every other respect justly and faithfully perform and discharge the duties and obligations which from time to time shall devolve upon him in such capacity." These words contemplate that he might receive moneys for the company by other ways and means than as treasurer; and that duties and obligations besides those pertaining strictly to the office of treasurer might, from time to time, devolve upon him in the capacity to which he was appointed. The bond, it is true, recites his appointment to the office of treasurer; but that being so does not limit the general words of the bond, as was held in *Oswald v. The Mayor of Berwick* (b).

As I understand the cases the surety is not discharged, particularly where the suretyship is in any such broad and general terms as it is here, by *some* changes in or addition to the duties of the office; but to discharge him there must be some material change in the nature and character of the duties of the office. In *Pybus v. Gibb* (c), where the suretyship was for the bailiff of a county, the surety was held discharged, the nature and duties of

(a) 3 Q. B. 271.

(b) 1 E. & B. 295; 5 H. L. C. 556.

(c) 6 E. & B. 902.

the office having been changed by statute. Lord Campbell (p. 911) stated the question to be, "whether the nature and functions of the office or employment are changed; for if they are," he added, "it is not the same office within the meaning of the bond;" and he pointed out the changes made by statute, adding: "I think that the office is essentially changed, and the sureties no longer liable."

1880.

Murray
v.
Gibson.

The language of some of the Judges in this case is commented upon in the more recent case of *Skillett v. Fletcher* (a), in the Exchequer Chamber. *Bramwell, B.*, quotes the marginal note to *Pybus v. Smith*: "Held, that these statutes had so materially altered the nature of the office of bailiff that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of *G.* was in respect of a matter within the jurisdiction conferred by Stat. 9 & 10 Vict. c. 95, in respect of which the duty of the bailiff was not altered by subsequent acts." And the learned Judge added: "I cannot help saying this is much more satisfactory than some of the expressions in the judgment, because it puts the matter on the right ground—that the office was altered." *Blackburn, J.*, said: "The marginal note in *Pybus v. Gibb* seems to me to be correct, and it agrees with Lord Campbell's judgment."

Judgment.

In the same case, in the Common Pleas (1 Ib. 225), *Willes, J.*, said: "It could not be, and was not said that the mere fact of the principal debtor having additional employment, and receiving a larger amount of money, which would be an increased temptation to dishonesty, relieved the sureties from responsibility." No fault is found with this language in the Exchequer Chamber. *Royal Canadian Bank v. Yates* (b), is a good deal like this case. The bond of *Barnes*, the principal, was, "during his service as clerk or in any other capacity, whatsoever," to be faithful in service, pay moneys,

(a) L. R. 2 C. P. 469.

(b) 19 U. C. C. P. 439.

1880. not embezzle, &c., and the surety covenanted for his principal doing this. The plea was, that before breach *Burnes* was (without the defendant's consent) removed by plaintiff from the situation of clerk in their employ, and appointed to another office and situation, to wit, to the office of teller in the bank at Kingston, which was another and different office, and in which he was entrusted with far larger moneys than in the former employment, and his responsibility entirely changed and greatly increased.

Murray
v.
Gibson.

This plea was demurred to, and the Court held it to be no answer to the declaration. I do not see that the words, "or in any other capacity" *whatsoever*, are larger than the words used in the bond in this case.

I have referred to the cases cited by Mr. *Bethune* and to some others. I do not find that in any of them a surety has been held to be discharged, unless the office itself has been essentially changed. I have examined what Mr. *Bethune* has pointed out as changes or additional duties. They do not, in my judgment, amount to such changes in the nature and functions of the office to which, looking at the language of the defendant's bond, *Gibson* was appointed, as that, in the language of *Bramwell*, B., "the office was altered." In my opinion, therefore, this ground of defence also fails.

Judgment.

I have had more doubt as to the effect of what is taken to be a change in the tenure of the office of treasurer. I do not find that the office ever was an annual one. But the by-laws of 1875-6 provide (No. 49) as to the solicitor, inspecting director, and treasurer, that neither shall be removed except at a meeting of the directors specially convened for that purpose, and by a two-thirds majority of the whole board. How the treasurer was removable before the passing of that order I am not informed, so that I do not know whether that order facilitated his removal or made it more difficult, or made any change one way or the other. But I think the objection ought not to be entertained.

1880.

Murray
v.
Gibson.

The answer does not, with any distinctness, point to this supposed change as a ground of defence; nor do I know that it was in the mind of the pleader when he framed the fourteenth paragraph of the answer. The objections are too general to enable me to say. The objection is so little meritorious that I should not have permitted a supplemental answer in order to its being raised. I doubt if it would be a good objection if raised. The cases cited in Mr. *Brandt's* book, sec. 142, are, as it seems to me, all distinguishable from this case, but, as the point is not, as I think, open under the pleadings, I do not discuss them.

Mr. *Boyd* contends that the entries in the office books by *Gibson* are evidence against his sureties, and cites *Middlefield v. Gould (a)*; but in that case the person making the entry was dead when the evidence was offered. It might not be unreasonable to extend the rule so as to admit the evidence where the person making the entry has absconded and his evidence cannot be procured; but I find that such evidence was offered and refused in *Stephen v. Gwenap*, reported in 1 Moo. & Rob. (b). It is clear, as a general rule, that it is only where the person making the entry is dead that the entry itself is evidence. Judgment.

There is, however, sufficient evidence for a decree referring it to the Master to take an account, without the entries themselves being evidence. It is only that the further evidence to prove items will, if the objection be pressed in the Master's office, make the taking of the account more difficult. I do not intend, however, to limit the powers of the Master in taking the account under order 228, or otherwise.

The decree will be with costs.

(a) 10 U. C. C. P. 9.

(b) p. 120.

1880.

HOPPER V. HARRISON.

Practice—General orders 244, 245—Discovery—Relief.

In proceeding upon a reference under a decree, the Master cannot under the General Orders 244, 245, order a person to be made a party to the suit against whom any relief is sought; and where in proceeding under a decree for the administration of a testator's estate, the Master directed one *D.*, who had been in partnership with the testator up to the time of his death to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which *D.* appealed, the Court [PROUDFOOT, V. C.,] held the object of making *D.* a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as *D.*, so far as discovery was concerned, could only be regarded as a witness.

This was a motion to set aside the order of the Master directing one *William Davison* to be made a party in his office, under the circumstances set forth at length in the judgment.

Mr. *Spencer*, for *Davison*.

Mr. *Moss*, for the plaintiff.

Mr. *Perdue*, for the defendants other than *Davison*.

August 31st.

Judgment.

PROUDFOOT, V. C.—This bill is filed by a legatee under the will of *Henry Harrison*, and an order has been made for the administration of his estate. The defendants in the suit are the executrix and the executor.

Henry Harrison was in his life time and at the time of his death in partnership with one *Robert John Davison*, and shortly before his death the testator made an agreement with *Davison*, that, in the event of the death of either, his executors should continue the partnership with the survivor for so long a time as might be agreed upon or as might be necessary.

Upon the death of the testator, his executors continued the business with *Davison* in pursuance of that agreement.

1880.

Hopper
v.
Harrison.

In proceeding upon the reference, the Master has deemed it necessary to take the accounts of the partnership, to ascertain the amount of the testator's interest therein, and has ordered *Davison* to be made a party to the suit, and to be served with an office copy of the decree under General Orders, 244, 245, indorsed as required by those orders, and has issued a warrant requiring *Davison*, together with the executors, to bring in under oath an account of the partnership dealings, &c.

Davison now moves for an order to rescind and set aside the order and warrant of the Master, making him a party, on the ground that no proof was given that he was a necessary party, and that he cannot properly be made a party in the Master's office for the purposes mentioned in the order and warrant of the Master.

Judgment.

In support of this application, *Davison* has made an affidavit stating that three weeks before he was made a party, all the stock in trade, assets, book debts, books of account, and securities of the firm of *Harrison* and *Davison* were sold at public auction at the instance of the creditors of the firm, all parties consenting to the sale; that the books of the firm are in the hands of the purchasers and out of his control; that he cannot, without the books, make up an account of the partnership dealings; that before the sale the executors had access to all the books, except for a period of about a week, when the same were in the possession of the creditors, who were having the stock taken for the purpose of winding up the business and making a sale thereof; that he never refused the executors access to the books of the firm, or withheld from them any information as to its dealings; that before the decree the business had been going backwards and the credi-

1880. tors determined to wind it up; that the proceeds of the sale were not sufficient to pay the debts of the firm, and the whole amount went to the creditors, and he claims nothing out of the business, or against the estate of the testator; that he is willing to give evidence in the cause as to the partnership affairs, and to furnish the executors with any information in his power; that the bookkeeper of the firm was chosen by the executors; that before he was made a party the firm was dissolved by the sale, &c.

Hopper
v.
Harrison.

All the matters stated in this affidavit are more properly grounds for an application to the Master to vary or modify his order and warrant than for an application here to rescind the order. But no application of that kind has been made, or they might prove grounds for excusing the defendant from making up an account, though the affidavit does not shew that he cannot have access to the books if he desire it.

Judgment. The motion, however, was argued upon the broader ground that the Master had no power under our General Orders to make any one a party against whom relief is sought, and that relief is sought here by requiring *Davison* to bring in accounts.

It was assumed upon the argument, that the question had been decided by Master *Boyd* in *Kline v. Kline* (a), in favour of the authority of the Master, and the motion was made for the purpose of bringing that case under review. But I do not so understand that decision. The Master refers to the construction placed by *Mowat*, V. C., on the General Orders, limiting their operation to cases in which it was only desired to bind the defendant, not to seek any relief against him, and in conformity with the decisions to that effect, directs the partner to be served. It is plain, then, that he did not mean to say, that if relief were sought against him, it would have been proper to make him a

(a) 3 Ch. Ch. R. 187.

party in the Master's Office. The true deduction would seem to be, that no relief being sought against him he might be made a party.

1880.
Hopper
v.
Harrison.

In *Rolph v. The Upper Canada Building Society*, (a) *Mowat*, V. C., held that the general language of General Order 244, (16th sec. of Ord. 42) must receive a qualified construction, and could not have been intended to apply to every case, as the Court has made special provisions in regard to part owners of an equity of redemption, and in regard to incumbrancers; and he therefore decided that the order "must be confined to cases where no direct relief is sought against the parties to be added, or where the object is merely that they may be bound by the proceedings in a manner analogous to what is provided for by the 6th Order of June, 1853." (b)

The order of the Master and the indorsement on the decree, do not shew that anything more was required from the defendant than to bind him, and they cannot therefore be set aside, as it is proper enough, within that decision, to make him a party for the purpose of binding him. Nor is it material that he says in his affidavit that he does not claim anything against the deceased's estate, or against the firm, as it is requisite to put that in a shape to be available against him, which can be most effectually done by making him a party.

Judgment.

But a different question arises in regard to the warrant requiring *Davison* to bring in accounts in conjunction with the executors. What is sought is, either relief or discovery. If relief, then it is beyond the Master's power under the General Order, as construed in *Rolph v. The Upper Canada Building Society*, *supra*. If discovery, then it would seem that the plaintiff not being entitled to relief, or the party added being in such a position that relief cannot be

(a) 11 Gr. 275, 278-9.

(b) Gen. Ord. 60.

1880.

Hopper
v.
Harrison.

had against him, the plaintiff cannot, in this mode, have discovery from him. Thus, where a bill was filed for a discovery merely to support an action intended to be commenced at law, though the case was thus brought within the jurisdiction of equity to compel a discovery, yet the Court being of opinion that the case stated by the bill was not such as would support an action, a demurrer was allowed; for unless the plaintiff had a title to recover in an action at law, supposing his case to be true, he had no title to the assistance of a Court of Equity to obtain from the confession of the defendant evidence of the truth of the case. *Debigge v. Howe*, cited in *Vanheythusen*, Eq. Draftsman, vol. 1, p. 483. Mr. Maddock (a) says: "The modern doctrine is, that if a bill be brought for discovery and relief, if the discovery is sought for the purpose of the relief, the plaintiff cannot have the discovery." More recent cases to the same effect may be found collected in *Seton* on Decrees, 4th ed., 157.

Judgment.

A bill praying for an account, and therefore a warrant requiring the production of an account, would seem to be asking relief; *Frietas v. Dos Santos* (b).

But whether it be relief or discovery, the plaintiff is not entitled to it in this mode of proceeding. *Davison* can only be regarded as a witness, so far as discovery is concerned; and there is no objection to his examination as a witness, and he expresses his readiness to give all the information he has in that way.

The warrant, therefore, so far as it requires *Davison* to bring in accounts, is discharged; the motion in other respects is refused. There will be no costs.

(a) Ch. Pr. vol. 1, p. 292.

(b) 1 Y. & J. 574.

GALBRAITH V. DUNCOMBE.

1880.

*Executors—Trustee—Setting aside money for special purpose—
Principal and surety.*

Under a will leaving money to testator's children, to be paid on their coming of age, and to be deposited by the executors in a Savings Bank, in the meantime one of the executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian. *Held*, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet, under the circumstances, the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced, with costs; though as against the surety the bill was dismissed, with costs.

This bill was filed by the infant children of the late *A. N. Galbraith* against his widow, *Clementina Galbraith*, and her sureties, *D. T. Duncombe* and one *Chadwick*. The testator left a will bequeathing to the children a sum of about \$700, to be paid to them on coming of age. In the meantime the executors were directed to deposit and keep the money on deposit in a savings bank. The money was placed on deposit by the executors accordingly. *Mrs. Galbraith* was one of the executors. The defendant *Duncombe*, who was her solicitor, represented to her that as the money was only bearing four per cent. interest, she had better take it out of the bank, and invest it in some other way, and that he could get her a safe investment at eight per cent. She swore that she consented to his doing so, and he then advised her that to enable her to draw out the money she must apply to the Surrogate Court, and be appointed guardian to her children, which she consented to do; and instructed *Duncombe* to draw the papers, and take all necessary steps to have her appointed guardian, which was done, *Duncombe* be-

Statement.

1880. coming one of her bondsmen and the defendant *Chadwick*, at *Duncombe's* request, became the other bondsman. The bond was in the usual form required by the Surrogate Act. Letters of guardianship were then issued, upon which the co-executors of Mrs. *Galbraith*, at the request of *Duncombe*, executed the necessary papers to enable her to draw the money from the savings bank. The business was all transacted by *Duncombe*; and he induced Mrs. *Galbraith* and her children to sign the necessary order for the money to be paid over to him. He received it as her agent and solicitor, and fraudulently misapplied it to his own use, and absconded. The money never actually came into her hands, except that the cheques representing the amount procured by *Duncombe* from the bank were presented by him to her and her children to indorse over to *Duncombe*, to enable him to draw the money, and which they did at his request.

Statement. The bill sought to make the guardian and her sureties liable for the money. The cause was taken *pro confesso* against the guardian and *Duncombe*, both of whom were held liable; but the defendant *Chadwick* set up various defences, all of which were decided against him at the hearing, except the chief defence raised, namely, as to whether, as surety of the guardian he was liable on the evidence.

For the surety it was contended, (1) that the money never reached the hands of the guardian, and (2) that she did not receive it *as guardian*, but in breach of trust and as a mere wrong-doer.

Mr. *Spencer*, for the plaintiff.

Mr. *Osler*, Q.C., for the defendant *Galbraith*.

R. S. O. ch. 132, sec. 4; *Kerr* on Receivers, 189; *Maunsel v. Egan* (a), *Dawson v. Raines* (b), *Re*

(a) 3 J. & Lat. 251, 154.

(b) 2 Russ. 466.

Lockey (a), Crawford v. Howard (b), Brayton v. 1880.
Town (c), Commissioners v. Mayrant, (d), Brandt on
Suretyship, 487, 490, 491, were referred to by counsel.

Galbraith
v.
Duncombe.

BLAKE, V.C.—I think, as the money in question had been set apart by one of the executors to answer the trusts of the will, the same became thereby stamped in his hands as trust money, and he accepted the office of trustee in respect thereof. He could not, therefore, properly pay this money to, nor could the guardian properly receive this sum. I think, under the circumstances, as the money went into the hands of the defaulting solicitor, although he is responsible for the amount, it cannot be followed into the hands that never received it, namely, the hands of the guardian, so as to make her surety liable: See *Brandt on Suretyship*, secs. 451, 499, & 500. The bill must therefore be dismissed against *Chadwick*, with costs. There will be a decree for payment of the amount against the other defendant, the guardian, with costs, as the bill is *pro confesso* against her.

Judgment.

(a) 1 Phil. 511.

(c) 12 Iowa 346.

(b) 9 Ga. 314.

(d) 2 Brevard S. C. 228.

1880.

NEILL V. CARROLL.

Mechanics' Lien Act—Lapse of time—Repairing property.

The plaintiffs delivered and set up for the defendant a boiler and engine, supplied by themselves, in September, 1878, upon certain terms of credit, which expired on the 25th April, 1879. Registration of the lien was effected on the 23rd December, 1878, and a bill to enforce the lien was filed on the 31st May, 1879.

Held, that the effect of the delay in the registration of the lien was, that the lien under the Act had ceased to exist, notwithstanding the plaintiffs had done some immaterial work upon the machinery late in December, 1878; the thirty days within which the registration was to be effected being to be computed not from the time such alterations were made, or the defects in the machinery were remedied, but from the time when it was supplied and placed, *i.e.*, in September, 1878.

Quære, as to the effect of the Act when the credit does not expire until after thirty days from the completion of the work, and there has been no registration of lien.

This suit was instituted by *John Neill, John Neill the younger, and Robert Neill* against *Thomas Carroll and William Kerr and Alfred Merrin Patton*, trustees of the estate of *Carroll*, but, in consequence of *Carroll* having become insolvent under the Act, the bill was amended by making the assignee a party in place of *Carroll*. The object of the suit was to enforce the mechanics' lien claimed by the plaintiffs upon a certain engine and boiler furnished by them to the insolvent.

The circumstances under which the machinery was furnished, and the present suit instituted, are clearly stated in the judgment.

Mr. W. Cassels, and Mr. G. W. Watson, for the plaintiffs.

Mr. Meyers, for *Munro*, the assignee.

Mr. Howard, for *Kerr and Patton*.

Sept. 1st. SPRAGGE, C.—This is a bill under the Mechanics' Lien Act, by a firm carrying on business as machinists, for the price of an engine and boiler furnished to the

defendant *Carroll* for a planing factory carried on by *Carroll*; and the question is, whether the plaintiffs' lien was registered and their bill filed within the period limited by the Act.

1880.

Neill
v.
Carroll.

By the contract, which is contained in two letters of the same date, 26th of July, 1878, a certain portion of the price was to be paid when the machinery should be ready for delivery at the plaintiffs' foundry; the "balance in three months' note, renewable on payment of not less than \$100." The plaintiffs contend that the lien was duly registered; and that the bill was filed within the prescribed period from the expiry of the credit agreed upon.

The evidence is, that the machinery was furnished and placed in *Carroll's* factory in the course of September in the same year, 1878; that a note on account of the price, for \$800, was given on the 19th of October following, which, being at three months, would fall due on the 22nd of January 1879: and a renewal for the same period, which I take to have been the meaning of the contract, would mature on the 25th of April, 1879. The registration of the lien was on the 23rd of December, 1878, and the bill was filed on the 31st of May, 1879.

Judgment.

The defendant *Carroll* in his evidence states that he did not accept the engine when first put up in September; that he refused to accept it until he had time to test it; that he had accepted it before the giving of the note of the 19th of October, 1878.

The time for registration under section 4 of the Act is before or during the progress of the work, or within thirty days from its completion, or from the supplying or placing of machinery; and section 20 provides that every lien not duly registered shall cease after the expiration of such thirty days, unless in the meantime proceedings be taken to realize the claim.

The plaintiffs contend that they were within time in their registration of lien, because there was a

1880. defect in some brasses, part of the machinery, which was not remedied until late in December, 1878. This defect, however, did not prevent the working of the machinery; a sufficient proof of this is in the fact that the plaintiffs having sent up a workman or workmen on the 14th of November to remedy the defect, *Carroll* postponed their doing it, as the machinery was then at work on a job in hand. The fault was that it worked noisily, that it "pounded," and the plaintiffs remedied the defect at a cost to them of some \$20 or \$30. The contract price was \$1100.

Neill
v.
Carroll.

Judgment.

I cannot accede to the contention of Mr. *Cassels* that the time for registration of the lien is to be computed from the remedying of this defect. The thing contracted for was, in the language of the Act, supplied and placed in September; and there being a defect in some detail did not make it the less supplied and placed. The evidence indeed shews that it was more than supplied and placed: it was used and worked, and accepted. This was not necessary under the Act; but it is evidence at least of the machinery having been supplied and placed in *Carroll's* factory by the plaintiffs.

A similar question arose in the case of *Dunn v. McKee*. I agree in the view taken of the case as reported in *Sneed's Reports* (a). Mr. Justice *Wright*, who delivered the judgment of the Court, remarked:

"In this cause we think the complainant *Dunn* has failed to establish a Mechanic's Lien. Taking the pleadings and proof together, we are led to believe that he completed *McKee's* dwelling in August, 1853, when the notes upon which he seeks to maintain his bill were executed; and the work done in April, 1854, and spoken of by the witness *Murry*, was merely to repair a leak in the roof of the building. If so, his lien was lost by lapse of time, long before he filed his bill. He does not pretend to base his lien upon any claim for these repairs; nor to inform us whether

(a) Vol. 5, p. 657.

anything was demanded on this account or not. But from the record before us, we have little doubt the repairs, whatever they were, and they seem to have been very trivial in their character, were made without any further charge, either to save litigation with *McKee*, or because of a defect in the execution of the original contract. The bill then must be confined to the notes. It is plain he began the work in the month of March or April, 1853; and the notes sued on for the final balance were executed in August afterward. The conclusion is almost irresistible, that the work had then been done. If not, it is strange, indeed, that in a transaction so easy of proof as this, complainant's evidence should be so meagre and unsatisfactory. The Chancellor decreed against complainant, and we affirm his decree."

1880.
Neill
v.
Carroll.

Mr. *Cassels* refers to *Munro v. Butt* (a), but the question there was, whether certain buildings were so completed within the terms of a special contract as that the builder could sue upon the contract. In fact they were not completed at all, and the Court held that he could not sue upon the contract or upon the common counts. But the case is not an authority that this contract was not so executed that these plaintiffs might not have sued upon the special contract itself. Lord *Campbell* says, p. 753: "If indeed the defendant had done anything, * * or if the failure in complete performance being very slight, the defendant had used any language, or done any act, from which acquiescence on his part might have been reasonably inferred, the case would have been very different."

The case put by Lord *Campbell* was the case here; but still that is not the point; the point is, whether the machinery was supplied and placed in *Carroll's* factory more than thirty days before the registration of the lien. It appears to me to be clear that it was.

There is a state of circumstances which does not appear to be provided for in the Act in the R. S. O.,

(a) 8 E. & B. 733.

1880. consolidating the Acts of 1873 and 1874, viz, the case of credit given and not expiring till after thirty days from the completion of work, or furnishing of materials; there being no registration of lien. Where there has been a due registration, the case of expiry of credit is provided for, and the time limited for bringing suit is made to run therefrom; but where there has been no registration the time for bringing suit is limited to thirty days after completion of work or the furnishing of materials. It is either a *casus omissus*, or it must have been intended that where the period of credit is for more than thirty days beyond completion of work or furnishing of materials, the contractor must register in order to preserve his lien; and I think it is well that it should be so for the protection of third persons dealing with the owner in respect to the land. The point I find has been noticed by Mr. *Holmsted* in his book, p. 13, *n. b.*

Judgment

In this case, however, if the Act had given thirty days for bringing suit (there having been no registration,) after the expiry of credit, the plaintiffs would not have brought suit within time, inasmuch as the full period of credit expired, as I have shewn, on the 25th of April, and the bill was not filed till the 31st of May.

The bill must therefore be dismissed, with costs.

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1880.

THOMPSON V. HOLMAN.

Principal and agent—Power of sale—Mortgage—Costs of sale.

The rule of equity which prevents an agent acquiring a benefit for himself in any dealings with the estate of the agency acted upon, where an agent had been employed to sell or exchange certain lands of the principal, which, however, the agent had been unable to effect, and the property was shortly after offered for sale by auction under a power of sale in a mortgage, when the agent bid for and became the purchaser. The Court, (SPRAGGE, C.,) in a suit impeaching the purchaser, declared the agent a trustee for the principal; but as the plaintiff made several unfounded charges of fraud and other misconduct, the relief was given, without costs. The mortgage, at whose instance the sale had been effected, having been made a defendant to the bill, and charges made of his having combined with the agent to defraud the principal, all of which were negatived, the bill as against him was dismissed, with costs. The costs of proceedings to obtain a sale of mortgage premises are such a charge upon the estate as will entitle the mortgagees to proceed to a sale of the property in the event of nonpayment.

The bill in this cause was filed to set aside a sale of part of lots 16, in the 2nd concession, and 16 in the 3rd concession of the township of North Gwillimbury, under the power of sale contained in a mortgage made to the defendant *Holman*, by one *McGlashan*, a former owner of the property. At the time the mortgage was made to *Holman*, *McGlashan* was the owner of the lands, subject to two mortgages; and after giving the mortgage to *Holman* he conveyed the equity of redemption, subject to the three mortgages to the defendant *H. E. Custon*, who subsequently mortgaged the same to the plaintiff, to secure the payment of certain notes, which last-mentioned mortgage was registered on the 6th of March, 1880.

Statement.

The principal secured by the third mortgage became due on the 1st of November, 1879, and after several applications for payment and considerable correspondence between the solicitors for the parties, the property

1880. was advertised to be sold under that mortgage on the the 14th of February, 1880.

Thompson
v.
Holman.

On the 13th of February, the day before the day named for the sale, *Caston* sent to *Proctor* the solicitor for *Holman* a check expressed to be in full, and for a sum sufficient to pay the principal and interest due on the mortgage up to that date, and requested a memorandum of the costs. Next day the sale was adjourned for two weeks, to allow the costs to be settled and paid, which, after some correspondence, the defendant *Caston* refused to pay, contending that there was no liability on his part to do so, and also that the covenants and provisions in the mortgage, which was under the Short Forms Act, did not provide for the mortgagee adding costs to the debt, or for proceeding with the sale after payment of principal and interest without costs.

Statement.

No further payment having been made the property was, on the 13th of March, offered for sale, and the defendant *John Thomas Culverwell* became the purchaser at the reserve bid, \$80, subject to the prior mortgages amounting to \$2,750.

The plaintiff, in his bill of complaint, charged irregularity and impropriety in the sale, want of notice, collusion, fraud, &c., between the parties; and also that prior to the said sale the defendant *Culverwell* had been appointed and was acting for *Caston* as his agent in negotiating a sale of the lands, and that such agency between *Culverwell* and *Caston* had not been determined at the time of the purchase by *Culverwell*; and the plaintiff prayed that *Culverwell* might be declared to be a trustee of the said lands for the defendant *Caston*.

The defendants answered the bill, *Holman* denying all fraudulent and corrupt practices whatever; *Culverwell* insisting that any fiduciary relation that had existed between him and *Caston* had been terminated before the sale, and that therefore he was in a position

to bid for and purchase the property when put up for sale, *Caston*, on the other hand, insisted that the relative positions of principal and agent had not ceased between them, and consequently that *Culverwell* could not be permitted to purchase, and that any purchase effected by him would, under the circumstances, enure to the benefit of the defendant *Caston*.

The cause came on for hearing at Toronto sittings in the Spring of 1880.

Mr. Moss, for the plaintiff. The plaintiff's claim to relief rested on several grounds: First, we contend that the power of sale was exercised improperly. The evidence distinctly shews that before the day of sale the amount of principal and interest then in arrear was paid to *Proctor* the solicitor of the mortgagee, so that the only question then remaining to be settled was a question as to the amount of costs properly payable. True, it is now attempted to be shewn that the amount then paid was received by *Proctor* on account generally. However, that is not tenable as *Caston* proves distinctly that he had appropriated the payment to the payment of the instalment and interest then due, leaving only the amount of costs to be ascertained; and *Proctor* could not, without the consent of the mortgagor, alter or change the appropriation so made. [SPRAGGE, C.—That is so, as the check sent by Mr. *Caston* was drawn shewing to what the payment was to be applied, but Mr. *Proctor* on the same day wrote to Mr. *Caston* saying that he applied it generally.] Such is the case, but he had not the power after the appropriation by the debtor to change it; if not satisfied with the application as made by *Caston*, his duty was to return the check and he did not do so. [SPRAGGE, C.—And Mr. *Caston*, though made aware of the appropriation intended to be made by Mr. *Proctor* of the amount of the check, did not demand its return.] In the letter of the 13th of February, *Caston* expressly under-

1880.
Thompson
v.
Holman.

Argument.

1880. takes to pay the costs as soon as taxed. No sale therefore could be had under the circumstances. The amount of principal and interest then due having been paid, the mortgagee was not at liberty to exercise the power of sale, for the purpose of realizing the costs. A trustee having incurred costs cannot sell to reimburse himself, his only remedy is, to come to the Court and ask to have the amount raised, and as stringent a rule at least must be applied to a mortgagee. The second ground of objection is, that assuming the mortgagee could exercise the power, he must exercise it with a due regard to the interests of the mortgagor. Here, the property was advertised to be sold on a particular day, and the day preceding the money was paid as stated, and the sale was not proceeded with, but was adjourned until the 28th, which of itself was sure to damp the sale as intending purchasers were not at all likely to attend such an adjourned sale, and then a further postponement was made to the 13th of March, when, without any new notice of the sale, aside from a few posters put through the city for only four days, the sale was effected. In such a case the Court would require three weeks' notice at least to be given. The only intimation of the sale was conveyed by these posters, and they contained a palpably erroneous description of the property—the land being described as being fifty instead of fifty-five acres, a very important difference where property is shewn to be as valuable as this land was. As regards the defendant *Culverwell*, he was clearly acting up to the very last as agent for *Caston*, and is now holding on to this purchase as a means of forcing money out of *Caston*. He says himself that he has lost \$400 or \$500, and seeks now to hold on to this property till paid this amount. It is true *Culverwell* now attempts to deny his being agent, but he is obliged to admit that he expected to be paid a commission in the event of his having effected a sale or exchange of *Caston's* lands. Under these circum-

Thompson
v.
Holman.

Argument.

stances it is out of the question for *Culverwell* to attempt to deny his agency, and the agency being established, it is contrary to the well established doctrines of the Court that he should be permitted to retain the property of his principal obtained in the way this has been.

1880.
Thompson
v.
Holman.

Mr. *Cassels*, for the defendant *Holman*. In any view of this case the bill as against my client must be dismissed, with costs, as the proof entirely fails in shewing any improper act or dealing with the property by *Holman*. [SPRAGGE, C.—There are only two points that I think your client is at all interested in. One, as to the advertisement, and the other, the statement as to interest. Mr. *Holman*, I am satisfied, did all he could to avoid causing any loss or injury to Mr. *Caston*.] Here all the difficulty has been created by Mr. *Caston* having paid the money then due, which fact should have been communicated to the vendor. *Jones on Mortgages*, 1634.

Argument.

Mr. *J. H. McDonald* for the defendant *Culverwell*. The whole point in the case so far as *Culverwell* is concerned, is involved in the one question: Had he the right to sell the lands belonging to *Caston*? It is out of the question to contend that, after the sale under the power in the mortgage was advertised, any one would think of effecting a sale on behalf of *Caston*, and this being so, and *Culverwell*, having been thus deprived of any power or agency in the matter, was at liberty to purchase in the same way as any other person would be: *Fox v. Mackreth* (a), *Guest v. Smyth* (b).

Mr. *Moss*, in reply. There is no fraud, legal or otherwise, charged against or intended to be imputed to the defendant *Holman*. The bill simply sets forth facts in which *Holman* was mixed up which have resulted

(a) 1 W. & Tud. 123.

(b) L. R. 5 Ch. 551.

1880. in a fraud in the eye of a Court of Equity having been committed upon *Caston*. Everything was withdrawn from the bill, imputing in any degree the want of good faith on the part of Mr. *Holman*, and, therefore nothing that appeared in it as originally framed ought now to be relied on for any purpose: *Canada Permanent Building Society v. Young (b)*.

Thompson
v.
Holman.

At the conclusion of the argument,

SPRAGGE, C.—During the progress of the case I think I have said nearly all I need say with regard to Mr. *Caston* and the impracticable spirit which he appears to have displayed in the matter.

Judgment. I think, although it is said he has made no charge except such as may properly be made in a pleading where proceedings are impeached, that after reading over the bill, the charges are somewhat more serious than Mr. *Moss* concedes. I will quote several passages in the bill. I will refer to the charge made by *Caston*, "that the said proceedings were wrongly and oppressively taken by the said defendant," and others of a like nature.

I would also refer to the 18th clause charging a conspiracy amongst the parties. These are charges which when unfounded in fact ought not to be put in a bill. It is a great impropriety to put charges of this kind upon the records of the Court, unless there is really something tangible in the way of evidence to support them, and in this instance I cannot see that there is. In fact the evidence disproves such allegations. I do not think the allegations are even borne out by *Caston's* own evidence.

It speaks of the oppressive proceedings of the party before any attempt at sale, as if *Caston* had all the time been ready to discharge this debt, and that others

1880.

Thompson
v.
Holman.

were purposely preventing his doing it. Now the facts are very much opposed to that. It appears that the money was payable on the 1st November. Before the 1st November there was a letter written to *Caston* saying that the necessities of the party entitled to receive the money were such that he must call upon him to pay the amount. It is not necessary to follow the proceedings through, the many delays and promises from time to time, only made apparently to be broken. In this way it runs on till spring. I would refer to the way the check was sent by post and the way it was worded, sent, I believe to *Proctor*, and *Proctor* refused to receive it in that shape, refused to receive it in any other shape than a payment on account, that is, as a general payment on account of principal, interest and costs, which were chargeable on the land. Now the proper way in this Court to realise a charge upon an estate, is by a sale of the estate itself; that is a recognized rule of this Court. Now that this was a charge upon the estate, is perfectly clear from the very words of the contract as shewn in the form of mortgages. I do not see why the party in this case would not have just as much right as an execution creditor would have who wants to enforce the payment of a debt, to call upon the sheriff to proceed and sell the land that was advertised for sale for the payment of the costs; nor do I see anything in the case of *Jenkins v. Jones* (a), similar to this, where it is said that the land could not be sold for the costs and charges properly incurred. They are not costs in the cause, they are charges to which the party is put in order to realise his security. In the case of *Jenkins v. Jones*, there was a desire manifested to prevent the party from redeeming his property. That was not the case here, the parties were anxious that *Caston* should redeem, and they put off the sale from time to time,

Judgment.

(a) 2 Giff. 108.

1880. in order to afford him an opportunity of so doing. The proceedings in the two cases are entirely different. Here, so far from there being any determination to sell, there was an anxious desire to avoid a sale. The position assumed by *Caston* was this, that he was not liable at all; that no liability rested upon him, and that there was not any charge upon his estate. Upon what that position was founded I really cannot understand, there could be no reasonable doubt about his estate being liable; it certainly was.

There was an offer to adjourn the sale on payment of so much. Mr. *Caston* refused on account of his objection to the charges and disbursements. I think that was a very futile ground of objection. They were disbursements made actually in the endeavour to realise this debt. If he wished, he could have had a taxation, but Mr. *Proctor* appears to have acted reasonably. He says the disbursements were some \$35. At one time he said he would take \$25 in full for his charges and disbursements, so that I think there was nothing oppressive in all this, either by Mr. *Holman* or Mr. *Proctor*. I think what took place at the last interview was a striking instance of this; I take Mr. *Holman's* account of it, qualified by Mr. *Proctor's*, it was the day on which the sale took place, 13th March. That day, about half an hour before the sale, Mr. *Caston* came to *Holman* and offered him \$40; he said he would pay him \$40 if he would give a statutory discharge or something of that kind. *Holman's* counter offer is pay me \$40 and I will stop it, or I will drop it, and have the costs taxed. It appears there may be some misunderstanding whether he said "drop it" or "stop it."

Why so reasonable a proposition was not accepted I cannot understand. Why did he not pay the \$40, and what further might be found due upon taxation, and stop the sale. I can only say that Mr. *Caston's* refusal of that is unaccountable; I cannot understand it.

They say that the sale was improper, that proper notice was not given. It appears there was an advertisement in the papers, and there were posters, seventy-five for the first sale and fifty for the other, and men were employed to distribute them through the county. The form of the advertisement is not complained of. It is simply that not sufficient notice was given. Mr. Proctor says he took the practice of this Court as the proper method in which to give notice in this case in order that he might do all that was necessary.

1880.
Thompson
v.
Holman.

Then that the price obtained is unreasonably small. To set aside the sale on that ground it must be so very much below the true value that the vendors were bound to postpone the sale because it did not come up to a sufficient sum. I have put down the value as something like \$3,300. I am not quite sure that it comes quite up to that—\$3,200 or \$3,300, I think may be taken perhaps as the amount. The sum bid was \$2,963. If \$3,200 is about the value, it brought within about \$200 or \$250 of the value. Now it is out of the question, that after publicity of this kind, and the sale fairly made, that it was incumbent upon the parties to withdraw it from sale because it did not bring within \$200 or \$300 of the full value. That would be out of the question.

Judgment.

This has to be taken into account. It is against good policy, on slight grounds, to set aside sales. In my judgment there was nothing improper in accepting this sum.

The charges made by the bill, presumably at the instance of *Caston*, were those which he must have known to be entirely unfounded, and were put on the record knowingly; and certainly not with that care and truthfulness which the Court has the right to expect, and I think the bill as to *Holman* should be dismissed, with costs.

SPRAGGE, C., took time to look into the authorities as to what relief, if any, should be given against *Culverwell*, and on a subsequent day,

1880.

Thompson
v.
Holman.

Sept. 1st.

SPRAGGE, C.—I disposed of the points raised in this case at the close of the argument, with the exception of one, that one being whether the purchase made by defendant *Culverwell* at the sale by *Holman* under power of sale contained in his mortgage, could be held by him, or was impeachable in this Court on the ground of fiduciary relation between *Caston*, whose land was sold, and *Culverwell*.

At the hearing, the inclination of my judgment upon that point was that *Culverwell* could not purchase for his own benefit. The sale at which he purchased took place on 13th March, 1880. Early in the same year *Culverwell*, who was a land agent, and through whom the land had been purchased by *Caston*, was the agent of *Caston* for the making sale, or as he says, bringing offers for purchase, or effecting an exchange of the same lands. *Culverwell's* position is, that this agency was terminated before the sale by *Holman*, at which he purchased; but I think his evidence shews that this was not so. On or about the 10th of February there was an acting in the agency in his proposal to *Caston* to go and see lands which had been spoken of for an exchange; and there was not, so far as appears, any termination of the agency between that time and the sale. *Culverwell* says he was to place before *Caston*, for his approval, any offers that might be made; and that if he had done this and there was a sale, he should have obtained a commission. This implies agency, of course, and, for all that appears, it continued up to the time of sale.

Culverwell, in his evidence, was careful so to frame his answers to Mr. *Moss's* questions as not to admit agency; but I think it does, notwithstanding, appear from his evidence that he was *Caston's* agent in regard to the sale of this land; and we have also *Caston's* evidence that he was so.

Since the hearing Mr. *McDonald* has referred me to some authorities upon the question of purchases by

agents: and to the terms in which the doctrine is enunciated by Mr. *Lewin*. 1880.

Mr. *Lewin* (a) states the doctrine thus: "A trustee for sale, that is, a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property, whether it be real estate or a chattel personal, land, or a ground rent in reversion or possession, whether the purchase be made in the trustee's own name or in the name of a trustee for him, by private contract or public auction, from himself as the single trustee, or with the sanction of his co-trustees; for he who undertakes to act for another in any matter cannot, in the same matter, act for himself." Thompson
v.
Holman.

The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit."

The rule so stated, and the cases referred to, by Mr. *Lewin*, apply only, as Mr. *McDonald* contends, to cases where the sales have been by the purchaser either directly or indirectly. And there are cases where purchases have been upheld where the sale has been (as it has been in this case,) by a third person. *Stratford v. Twynnam* (b) was an instance of this; but there the purchaser was the execution creditor; and it was pointed out by the Master of the Rolls that there was no fiduciary relation between him and the execution debtor. Judgment.

Guest v. Smythe (c), decided in Appeal, in 1870, is another case to which I am referred. The Lord Justice *Giffard*, by whom the case was decided in Appeal, (overruling the judgment of Lord *Romilly*,) while recognizing the rule that "where a man's duty and interest conflict he cannot become a purchaser," held,

(a) 7th Ed., 48.

(c) L. R. 5 Chy. App. 551.

(b) Jacob 418.

1880. that there was not in that case any conflict of duty and interest. The purchase was by the solicitor of creditors of a mortgagee, who intervened in a suit by the mortgagee for realizing his mortgage debt by sale under the direction of the Court.

Thompson
v.
Holman.

I have not met with any case similar in its circumstances to the one before me; or similar in principle, unless this be brought within the principle of conflict of interest and duty. I thought at the hearing that there was such conflict in the position of *Culverwell*; and, reflection upon the case and a reference to the authorities, has not changed my view of it. *Culverwell* knew for several weeks before the actual sale that *Holman* was taking proceedings to sell under the power in his mortgage the land, for the sale of which he was the agent of *Caston*; and it was suggested to him by *Holman*, or his solicitor, that if he attended the sale he might get a good bargain. He was of the same opinion himself, for he did attend the sale, and did get a good bargain. During *Holman's* proceedings for sale, *Culverwell's* agency still subsisting, it was the duty of the latter to do his best for the interest of his principal, free from the bias of self interest.

Judgment.

If pending these proceedings an offer, by some third person, had been made to *Culverwell* for the purchase or exchange of this land, which it would have been to the interest of *Caston* to accept; and if *Culverwell* were at the same time contemplating the bargain that had been suggested to him for his own benefit, there would at once arise a conflict of interest and duty. It is no answer to say that if he effected a sale he would have got his commission; or that he would have preferred his duty to his interest. The law does not allow a man to place himself in a position where his interest may be brought into contact with his duty.

It is quite as important to preserve this principle intact in Canada as in England, perhaps more so, from the circumstance of property, real as well as personal,

being here held by a larger proportion of the inhabitants, and being dealt with to a greater extent. Instances may readily be put. A man, say a dealer in timber or lumber, may have considerable quantities of land. He may find it necessary, from a falling market in lumber or for other reasons, to offer a great deal of it for sale, and would probably place it in the hands of a land agent for sale. It is the practice of land agents, moreover, to invite persons having lands for sale to place them in their hands for the purpose, and thus they frequently have in their hands for sale large quantities of land belonging to different persons; and in the course of their business they necessarily become acquainted with the value of lands, and, as far as practicable, make themselves acquainted with the position and value of particular lots. The class of sellers to which I have just referred, and, indeed, others also, have frequently employed land agents to sell for them, from the pressure of necessity, to avoid a sale under a power in a mortgage or a sale in execution; and proceedings for a sale in either way may be going on concurrently with the lands being in the hands of the agent for sale; and this may be, and probably is generally, known to the land agent. It is obvious that in such circumstances a temptation exists for the agent to remove from sale the exceptionally good lots, looking to a purchase for himself, if the law will allow him, in the event of a forced sale by third parties, to purchase for himself; a temptation which we know from cases in this Court has not always been resisted; but resisted or not, there is in such case a plain conflict between duty and interest, and in my judgment the principle ought to be applied to such a case, and is applicable to the case before me.

The decree will, therefore, be as I indicated at the hearing it would be in the event of the plaintiff obtaining relief against *Culverwell*. The bill is dismissed against *Holman*, with costs; and the decree as

1880.

Thompson
v.
Holman.

Judgment.

1880. *Thompson v. Holman.* against *Culverwell* will be in the usual terms where a purchase by an agent of the land of his principal is set aside; except that it will be without costs, because of the unwarrantable charges of fraud contained in the bill.

McCALL V. THEAL.

Trade marks—Injunction.

The principle "on which the Court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another, a party therefore will not be allowed to use names, marks, letters, or other *indicia*, by which he may pass off his own goods to purchasers as the manufacture of another person." The plaintiff, a resident of New York, was engaged in the manufacture and sale of paper patterns, and under what he considered a permission from or arrangement with the proprietors of an illustrated paper called "Harper's Bazaar," styled such patterns "Bazaar Patterns," which words he registered in the United States and in Canada as his trade mark, and for the purpose of extending his business in this Province appointed the defendant his agent for their sale, who, for some years acted in that capacity, and subsequently commenced a like business in his own name, calling his patterns by the same name; stating that they were manufactured by "A. M. Theal," while those of the plaintiff were stated to be those of "James McCall & Co.," the defendant, however, using envelopes of the same colour and size; lettered and numbered in precisely the same way, the only perceptible difference being in the name of the alleged agent, which, to casual observers, would readily pass unnoticed. Thereupon the plaintiff filed a bill to restrain the defendant from using the name "Bazaar Patterns," or from otherwise inducing the public to believe that the patterns sold by him were those manufactured by the plaintiff. The Court, [BLAKE, V. C.] under the circumstances, thought there was not any exclusive right on the part of the plaintiff to the use of that term; but restrained the defendant from using wrappers similar to those of the plaintiff, or in any other way acting in such a manner as to lead to the belief that the defendant was selling the goods of the plaintiff. The plaintiff, however, having failed in the main branch of the relief sought—the use of the word "Bazaar"—this relief was granted, without costs.

This was a suit by *James McCall* against *Arminius M. Theal*, seeking to restrain the defendant from continuing to manufacture paper patterns and expose the same for sale in such a shape as to induce the public to believe they were purchasing patterns manufactured by the plaintiff.

1880.
McCall
v.
Theal

It appeared in the course of the proceedings that the plaintiff was a manufacturer of paper patterns of ladies and children's clothing, known as "Bazaar Patterns," which term the plaintiff appropriated and registered as his trade-mark in the United States and in this Province, and had for some time employed the defendant as his agent for the sale of such patterns in Canada. The bill of complaint alleged that the defendant, in order to mislead the public and induce the belief on their part that his patterns were the patterns of the plaintiff, called his patterns "Bazaar Patterns," and also imitated the envelopes and numbers of the plaintiff which enclosed the paper patterns, as also the cuts and printed matter on the envelopes.

Statement.

Under these circumstances the plaintiff claimed the right to restrain the defendant from using the term "Bazaar Patterns," as being an infringement of his trade mark; and also claimed the right to restrain the defendant from selling his patterns in such a way as to lead the public to believe that they were the patterns of the plaintiff.

The defendant, by his answer, denied the right of the plaintiff to use the term "Bazaar Patterns" as a trade mark, on the ground that he was not the first person who had applied that term to paper patterns; and denied also that he, the defendant, had ever made any representations to deceive the public as to his paper patterns.

The other facts of the case, which came on for hearing at the Autumn Sittings of 1880, at Toronto, are sufficiently stated in the judgment.

1880.

McCall
v.
Theal.

Mr. C. Robinson, Q.C., and Mr. J. H. McDonald, for the plaintiff. There is no necessity now to allege any intention to deceive, the question for the Court to dispose of is simply, was what is complained of not calculated to deceive and impose upon the public articles manufactured by the defendant as being those manufactured by the plaintiff. It is plain from the most casual inspection of the articles that they were calculated to mislead, and the evidence shews that on several occasions parties actually were led into the belief that the articles they were buying were the manufacture of the plaintiff. When the defendant, who had been acting as plaintiff's agent, undertook the manufacture of these articles on his own account it was his duty to adopt every reasonable means within his reach to prevent the public being deceived: *Taylor v. Taylor* (a), *Singer Machine Manufacturing Co. v. Wilson* (b). *Davis v. Reid* (c), was a case where the plaintiff had adopted a stamp on cigars manufactured by him, and the Court there determined that the stamp subsequently used by the defendants on their cigars was such as easily to impose on the public, and restrained the further use of the stamp by them, although upon a close examination it could be seen that the stamps were very different one from the other. A very different rule is applicable in the case of trade marks from that in the case of patents; in the former the mark may have been used by others, and yet if another person registers the mark as his he may be entitled to hold it: *Smith v. Woodruff* (d). Here it is shewn that up to 1878 the firm of *Harper Brothers* did not make use of the name "*Harper's Bazaar Patterns*," and Mr. *Leslie*, of New York, also published a paper called "*The Bazaar*," and also issued patterns with it, but he never adopted the name of "*Bazaar Patterns*,"

Argument.

(a) 23 L. J. Ch. 255.

(c) 17 Gr. 694.

(b) L. R. 2 Ch. D. 434.

(d) 48 Barb. 438.

and the patterns of both these persons were in England called and known by the name of "Bazaar Cut Paper Patterns." The whole case and the course of dealing adopted by the defendant evince a deliberate intention on his part of continuing such a mode of carrying on his business as would enable him to obtain the benefit which must necessarily have arisen from nine year's sale by the plaintiff of these articles. It is shewn by the defendant's own evidence that in January, 1878, the business connection between the plaintiff and the defendant ceased, and no question was ever raised as to the defendant's right to dispose for his own advantage of all the patterns and books of the plaintiff then in his possession. Instead of being satisfied with so doing, however, he deliberately adopts such a course of carrying on his business as was clearly calculated to impose on purchasers: (1) He imagines the existence of a company in New York, which he styles "The New York Fashion Company, New York," and on the outside of his envelopes, made in precisely the same form and with exactly the same coloured paper, announced that the Bazaar Patterns were "cut and guaranteed" by that company, and also announces "*A. M. Theal & Co.* [as] wholesale agent for Canada;" (2) the figures or numbers on his envelopes correspond with those of the plaintiff; (3) the patterns are precisely the same, being taken by the defendant from the pamphlets of the plaintiff, and made use of by the defendant; (4) the cuts on the envelopes are exactly those of the plaintiff, except that the impressions of them are reversed, and which he is unable to explain, and which is incapable of explanation, except upon the hypothesis that they had been pirated from the publication of the plaintiff; (5) the catalogues issued, it is shewn, were those of the plaintiff, which he procured, and then issued them in his covers; announcing them as "The Celebrated Bazaar Patterns, published by *A. M. Theal*." Under all these circumstances the right of the plaintiff

1880.
McCall
v.
Theal.

Argument.

1880. to the relief sought we submit is clear. *Sebastian on Trade Marks*, pp. 276-301, and cases there cited were also referred to by counsel.

McCall
v.
Theal.

Mr. McCarthy Q.C., and Mr. J. M. Reeve, for the defendant. If the word "Bazaar Patterns" is not a trade mark then the plaintiff's case fails; and the evidence establishes incontestably that the plaintiff was not the person who had originally used that name: *The Leather Cloth Co. v. The American Leather Cloth Co. (a)*. There was no exclusive use of the words, and apart from an appropriation of them there could be no property in the term; in other words, unless the term is attached or annexed to an article there is no property in it. This term "Bazaar Patterns" it is shewn had been used and applied to paper patterns before the plaintiff even pretends to have acquired any title to use the words, that is to the exclusion of other persons. In the year 1868 or 1869 *Harper's Bazaar* was published, and cuts of dresses were printed in it which were numbered; large numbers it is shewn were sold, and a profitable business carried on by *Harper*. The paper patterns were thus associated with the publication, and became known throughout the United States and the British Provinces as *Harper's Bazaar Patterns*. "McCall having become associated with the *Harper* Brothers in some way not material to the present litigation, the patterns were published as "Cut Paper Patterns," and were stated to be "taken from *Harper's Bazaar*," but the plaintiff's name is not added. In the next circular published by the plaintiff they are designated "*James McCall's Bazaar Patterns*." From plaintiff's own evidence it is plain that no assignment was made by *Harper* to him of any right in the name "Bazaar Patterns," but the *Harpers* simply gave a signed memorandum which stated that *McCall & Co.* were the only persons in the United States who had

Argument.

(a) 4 D. J. & S. 137, 142.

their premission to use the words "Bazaar Patterns." In *Catton v. Gillard* (a), it is said that you cannot separate a trade mark from the business in which it is used. The words here in question have in reality become public property. The term "Bazaar Patterns" has really little, if any, force. In all the envelopes the plaintiff puts *McCall's* patterns, while the defendant in his envelopes puts "*Theal's* patterns." In all the cases it is said to be necessary to shew that there was an intention to deceive. Now, here the slightest attention on the part of intending purchasers would prevent any deception, as the name of the defendant is distinctly placed upon the outside of the envelope, as being the manufacturer of the goods: *Boulnois v. Peake* (b), *Samuel v. Berger* (c), *Collins v. Brown* (d), *Edelsten v. Edelsten* (e), *Estcourt v. Estcourt* (f), *Ford v. Foster* (g), *Shipwright v. Clements* (h), *Cooper v. Hood* (i), *Sebastian on Trade Marks*, pp. 33 and 64 were also referred to.

1880.
McCall
v.
Theal.

At the conclusion of the argument,

BLAKE, V.C.—I do not know that any further consideration would cause me to alter my mind in the conclusion at which I have arrived, and, as Mr. Robinson says, the authorities define so well the position of the plaintiff and defendant that it is scarcely necessary to reconsider them. So far as the term "Bazaar" is concerned it seems to be very clear where that originated, as proved by some of the witnesses. In the year 1868, the *Harper Brothers* in the city of New York issued a publication called "*Harper's Bazaar*." But at a period of time, not very exactly defined, after

Judgment

(a) 44 L. J. Ch. 90.
(c) 24 Barb. 163.
(e) 1 D. J. & S. 185
(g) L. R. 7 Ch. 611.
(i) 26 Beav. 293.

(b) W. N. 1868, p. 95.
(d) 3 K. & J. 423.
(f) L. R. 10 Ch. 276.
(h) 19 W. R. 529.

1880.

McCall
v.
Theal.

Judgment.

the issue of the paper, as an adjunct to that, and in order to increase its circulation, they added some patterns to it, and these were called and known as patterns which were found in "*Harper's Bazaar*," or "*Harper's Bazaar Patterns*," variously described, but all drawing their origin from the paper of the *Harpers*, called *Harper's Bazaar*. The origin of the name is quite clear and distinct, and I think it is reasonably clear that within a very short time after that, in the year 1870, the name of "*Bazaar Patterns*" and "*Harper's Bazaar Patterns*" became so well known, that according to the letter of the plaintiff himself, he felt that it would be a matter of very great moment to him to be able to use that name. It is perfectly true, that giving his evidence here, he did not admit distinctly that what he had done in either 1870 or 1871—I should judge that it was in the year 1870—and found to be wrong, did not arise from the use of the name "*Bazaar Patterns*," but from the use of cuts from the paper that was called "*Harpers' Bazaar*." From the letter however which he wrote,* and which was not satisfactorily

* The letter here referred to was as follows :—

G. A. WALTON,

New York, May 11th, 1880.

DEAR SIR,—In reply to the enclosed notice marked "A," when I explain the circumstances you will better understand.

In the fall of 1871 I commenced manufacturing cut paper patterns under the name of *Bazar Patterns*. After six months I found, or supposed I had found, a mistake in using the name. The labor of six months, in which time we manufactured 50,000 patterns at a cost of \$10,000, was all destroyed. Believing, as we then did, that we were infringing on the rights of *Harper & Bros.*, I went directly to Mr. *Harper* and explained my position, and they, Mr. *Fletcher Harper, Sr.*, and Mr. *Fletcher Harper, Jr.*, advised me to go on manufacturing the patterns under the name and title of *Bazar Patterns*, and gave me a letter, a *fac simile* of the enclosed, marked "A." I manufactured under this name for more than a year; I had then a large amount of money in the pattern business, and to my astonishment I then learned that the Messrs. *Harper & Bros.* had no trade mark on the word "*Bazar Patterns*."

Messrs. *Harper & Bros.* stated to me that they did not use the name *Bazar Patterns*; neither did they cut *Bazar Patterns* nor offer them for sale, but advised me to procure a trade mark on the words "*Bazar Patterns*." Before doing so I set to work at considerable expense and labor and searched all the books and papers I could find in Europe and America, which occupied one or two years in the search, and could not find the words in print as applying to pat-

explained by him, it is perfectly clear that in 1870 or 1871, he had taken from this paper a large number of cuts and was about to enter into this business, and to use the name of the "*Paper cut Patterns from the Bazaar*," or "*The Bazaar Patterns*," or *Harper's Bazaar Patterns*." For a reason that is not assigned by him he felt that he should not proceed with the manufacture, and he then approached the *Harpers* after destroying some \$10,000 worth of property which was to have been the means of his entering into this trade. The only reason it is necessary to dwell upon that is, that from the letter of the plaintiff, and from the acts of the plaintiff, so far back as 1870, there was evidently in his mind a property in that name, and there was then in his mind the fact that he had not the right to use that name. He then approached the *Harpers*, and some arrangement that is not very clearly defined—Mr. *Harper* not bearing it in mind, and Mr. *McCall* giving an account of it, the whole of which is not entirely satisfactory, but giving an account of it which leads to the conclusion that then some kind of an arrangement, whereby he was to get the benefit of this name, and whereby the *Harpers* were to get the benefit of the increased circulation of their "*Bazaar*" which would arise from

1880.
McCall
v.
Theal.

Judgment

terns; nor in any way applying to patterns, direct or indirect, up to the time which I secured my patent; and I here state that the words *Bazar Patterns*, as applying to cut paper patterns, were never used previous to the date of my trade mark, at least so far as I know, or have been able to find. Mr. *Theal*, of your city, had full knowledge of my trade mark at the time, and was fully aware of my action in the matter.

Messrs. *Harper & Bros.*, and myself have worked harmoniously in the pattern business for eight years. It was agreed between us when I took out my trade mark that they—*Harper & Bros.*, should have the right to use the words *Bazar Patterns*, but they never used the words in any way until the year 1873, that is, *Harper & Bros.* sold their patterns under the name and title of "*Cut Paper Patterns*" in *Harper's Bazar*.

From 1871 to 1878, the name *Bazar Patterns* does not appear in any of their publications up to 1878. I have spent over one hundred thousand dollars in advertising over the name *Bazar Patterns*, and should the trade mark not be sustained it would be a damage to me and a very heavy loss.

JAMES MCCALL.

1880. the plaintiff's work being used as an advertising medium, was made. That he then thought so is perfectly clear from the instructions that were sent to his agent. He sent out the "*Harper's Bazaar Patterns*," and this name was used in the United States, and the name was more or less used in Canada, and it was a means whereby these articles "*Bazaar Patterns*," were designated, all arising from the fact that they had appeared in the first instance in a paper which was called the "*Bazaar*" or "*Harper's Bazaar*." The means of describing the articles required was from a number, and by sending for that number you got the pattern—the cut not giving you the full information—you got the pattern and you got the plan of making that up, thereby paying these persons for these cuts on account of the charge for the patterns, which was inevitable if you took a fancy to the cut, and desired to obtain the article. Then the name was used more or less by other dealers. There is no question but that, from the year 1871, at all events, till the year 1878, these were called the "*Bazaar Patterns*," or, "*Harper's Bazaar Patterns*." I do not know what right *Harper* had acquired in that name up to the year 1878, or what his rights would have been, but I think there can be no doubt whatever that in the United States these patterns were termed the "*Bazaar Patterns*." That came to be the name whereby they were known, and that term to my mind became very clearly public property, and it was impossible for any person, after it had been used for that period of time, to acquire a property in it, or to affix it to his goods so as to prevent others using it.

Judgment.

Then the question is, whether the plaintiff has acquired a right in this Province, although he might not have that right in the United States. The authorities cited seem to shew that the Court would be bound to protect a person who has identified an article with the name in a place other than the country in which

McCall
v.
Theal.

he has first done so. If in England they protect an American manufacturer, certainly in this country they would also protect one who has acquired a property in that name. I think that during that period of time, particularly by the intervention of the plaintiff himself, by, as he says, a large expenditure of money in advertising, &c.—\$26,000 a year—he helped to make this public property, and he was getting the advantage of it. He was trading to a certain extent upon the reputation of the *Harpers* and was making that as public as possible, and was building up his own business by virtue of the word "*Bazaar*" which had introduced this class of work, and every occasion on which he advertised this he was virtually making it public property, gaining for himself, by virtue of the *Harpers'* reputation, and "*Harper's Bazaar*," an increased profit to himself. The plaintiff aided therefore in making this public property, not only throughout the United States, but also throughout the Dominion, insomuch so that up to the year 1878, these were generally known as the "*Bazaar Patterns*;" or the "*Harper's Bazaar Patterns*." The principal words would be the "*Bazaar Patterns*," traced back to the newspaper which was called "*The Bazaar*," and the patterns which, to a certain extent—to a greater extent later, to a smaller extent in the earlier issue of the paper—were to be found connected with it. So that I think this was public property, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well known and current name by which that article was defined.

1880.

McCall
v.
Theal.

Judgment.

Then the second branch of the case is, has the defendant so conducted his business as that he has sought to make sale of the article which he has manufactured not upon its own merits so much as upon the merits of the name and reputation of the plaintiff? I do not know that any case we have had since the case of *Perry*

1880.

McCall
v.
Theal.

v. Truefitt (a), lays down better the principles upon which the Court should be guided. That seems to be the foundation in reality of all these cases, and there Lord *Langdale* says: "I think that the principle on which both the Courts of Law and Equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own that it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or has not a property in the name or mark, I have no doubt that another person has not the right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade, or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark." That seems to me to be useful as it is extended to names, marks, letters, or other *indicia* by which he might induce a purchaser to take as the article of another that which in reality he has manufactured. In the present case the defendant occupied this position.

Judgment.

He having been employed by the plaintiff for the sale of these articles, the arrangement terminates. It is utterly immaterial, and it is so conceded by the learned counsel both for the plaintiff and defendant, whether that was improperly or properly done, or whether a right of action existed in regard to the termination of that arrangement. We have nothing here to do with

(a) 6 Beav. 66.

that, but the question of the termination of the agreement is material in this aspect of the case; the defendant having been left with a considerable number of patterns of the plaintiff, he was entitled to dispose of those patterns, and therefore, means which might have been objected to if he had none of these patterns, would be unobjectionable if he used these endeavours to dispose of the articles which he had received from the plaintiff for the very purpose of sale.

1880.

McCall
v.
Theal.

He commenced this business for himself in such a way as that it was evident he was endeavouring to continue the same business in the eyes of the public. He admits himself that he did not desire to draw any distinction between the business conducted for himself, and the business he had conducted for the benefit of the plaintiff.

He admits that was so; and it appeared even to himself, prejudiced as a man would be in his own case, that there was so much similarity between what he, the defendant, was doing in conducting the business for himself, and the way which he had conducted the business for the plaintiff as that it might be objected to, and so he felt it proper to make an alteration.

Judgment.

He sought, in the first instance, to conduct the business like the business of the plaintiff as it was possible. He, for the purpose of carrying this out, invents a company in New York, because the plaintiff had upon his papers the name of some persons there, and in order to copy the plaintiff, in even this, he stated that he was acting by the authority of some person: he invents the name of the "New York Fashion Company," and then puts his own name as being the person that was acting in developing this business for that company. So down to the minutest matter everything was conducted after the plaintiff's fashion. The defendant sought to have an imitation of the business of the plaintiff, so that those dealing with the defendant might consider that they were in reality getting the

1880.

McCall
v.
Theal.

goods of the plaintiff. Nothing could be plainer than that to any man's mind. In fact it was even plain to the mind of the defendant himself.

He got the very pamphlets of the plaintiff, he purchased these, and then he put a wrapper upon them and thus we find a colourable imitation of the books of the plaintiff.

Mr. *McCarthy*—that was before he commenced the manufacture.

BLAKE, V.C.—I know it was before he commenced. The man had in his mind the course by which he was going to manufacture: he then forms a scheme by which he is going to carry on his business, and the scheme whereby he was going to manufacture and carry it on was a scheme by which there was to be an imitation of the business of the plaintiff, and it is immaterial whether it was before or after, for I am at present only dealing with the question, what had the defendant in his mind when he ceased the business he had been carrying on with the plaintiff, and began the conduct of it on his own behalf.

Judgment.

The scheme he had was a business that was to differ so slightly from that which he had previously carried on that the world would consider it was a continuation of it, and that every one would think, "here is the business of the plaintiff conducted by the defendant," and thus he was to gain the advantage of the reputation and skill and advertising and the large expenditure of money which had been incurred by the plaintiff.

Then he makes an alteration in his business, so apparent was it that it was the subject of attack, and the question is to-day, not what the defendant did in 1878 or earlier, but is he conducting the business to-day so as to lead persons to conclude that it is the business of the plaintiff? It is material to look at what the intention of the defendant was: was it his intention at once to construct it into a business to be carried on upon

the strength of a reputation which he was to make, that is, was it to be *Theal's* business, or was it to be the business so far as he was concerned of *Theal*, and as far as the public was concerned a continuation of the *McCall* business?

1880.
McCall
v.
Theal.

There is no doubt of the great resemblance originally and I think it is equally clear to-day that there has been so great a resemblance as that people are misled by what the defendant is doing. All these matters taken together shew this, although, as I said when Mr. *Robinson* was arguing the case, if there was only one of these matters, then the Court might say that it was so trifling that it could not be that a purchaser was misled by it.

We must bear in mind also that the authorities quite clearly lay down that the question is not, whether a person that is skilled in this class of business or a person that scrutinizes the difference between the article presented by the plaintiff and defendant would come to the conclusion that there was a difference, but the question is, whether one of the ordinary customers, —a person that does not narrowly scrutinize—would be misled? Now we have in the one paper produced, which it is said contains 145 cuts, 139 identical with the cuts of the plaintiff.

Judgment.

There is a great similarity in that book: 145 cuts, and of these 139 that are identical with the cuts of the plaintiff. It was very mildly argued—and indeed it could only have been so argued—that this great similarity was a coincidence. I believe there is an authenticated case in which a Frenchman and an Englishman wrote a book, and they were very much alike indeed, a book of travels; but it only happened once in the world.

Here I think it must be perfectly clear that the defendant took these patterns from the plaintiff. As Mr *McCarthy* very properly remarked, although that may be considered an honest thing in the trade, of

1880. course it is not considered an honest thing outside of the trade, that a man is at liberty to steal the work and reputation of others and not give him anything for it, but we have not to deal with that question here. It seems, according to the practice of the trade, the defendant was justified in taking these cuts; but what is material in this case is the manner in which these cuts are given to the public, and we have them here collected as cuts of the defendant, and out of 145,139 represent the actual cuts of the plaintiff with only this one difference, that they are in the reverse form in the book of the defendant. That is a matter that is incapable of satisfactory explanation for the defendant.

The explanation of the plaintiff would not suit him; but I believe his statement and that of his agent, that the way it comes to be reversed is that the very article of the plaintiff must have been used as the model, and transferring it from one to the other it gives it in the reverse shape: so that we trace the whole of this work of the defendant directly to the material of the plaintiff.

Judgment.

Then we find what strikes me, and has been very justly argued—as a matter that is most apt to mislead—the very numbers that were employed by the plaintiff were employed by the defendant. He did not commence with No. 1. I do not blame him for that. We know that many persons do not want to shew that their business has just commenced, and instead of beginning with No. 1, they begin with number 1,000 or 10,000; that is not a point that is worthy of comment. But it is argued that the numbers are identical with the numbers of the plaintiff, and I think that the way this is apt to injure the plaintiff and aid the defendant is, that persons would carry in their minds the number and demanding at the establishment the pattern to answer the number, and finding the number and pattern to correspond they would naturally think they were getting actually one of the plaintiff's patterns

from the defendant. It was the plaintiff's work that they demanded and expected to get; but they in reality would be getting the work of the defendant. I cannot conceive any means whereby one person can more plainly mislead another than by taking his cuts and putting opposite each cut the very number, which is there placed simply for the purpose of identification. We have the same resemblance as exactly as it possibly can be; we have that carried out in every department; we have a similarity of envelopes—I am not dealing with the question that the plaintiff and defendant are both using simply an envelope—but it is the same so far as the material and colour, and so far as the size is concerned it is made as identical with the envelope of the plaintiff as it is possible to make one resemble the other. It is said that the *Harpers* used an envelope, but it was an oblong envelope of a class that could not mislead the public.

1880.

McCall
v.
Theal.

These are all considerations which shew the intentions of the defendant. When he began he assimilated his mode of carrying on his business as exactly as it was possible for one man to assimilate his business to that of another; there is the resemblance of number and form and name. We perceive every matter in the defendant's business, down—as Mr. *Robinson* has observed—even to displaying the book of the plaintiff to the last moment in his window. What is there to correct this, the impression thereby made? The only thing done to correct it is, the putting the defendant's name on the envelope in the same place as the plaintiff has put his. Where everything else is so similar in the business of the one person with the other, is there sufficient to nullify all this by simply putting the name there? I think not.

Judgment.

I omitted the fact, that although the plaintiff has not got a property in the word "*Bazaar*," yet still the defendant has put that as a principal matter on his

1880.

McCall
v.
Theal.

Judgment.

envelopes and in his various sheets just as the plaintiff has put it in his, so that it is one of the concomitants or surrounding circumstances to identify that which has been issued by the defendant as being that which has been issued and is in the course of being issued by the plaintiff. I do not think the mere insertion of the name on the envelope is sufficient to counteract all that is there to lead the public to believe that what has been issued by the defendant is the article of the plaintiff. I think that the statement of the defendant is correct, that he had an intention in doing what he has done; that he not only put these numbers there, used these envelopes, made as like those of the plaintiff as he could; that he intentionally put on the back of it a cut; that he desired to imitate the manner and mode of making it up; and that he intentionally clothed his articles with everything that was to make them as similar to the plaintiff's as possible, and this was so very plainly an infringement of the rights of the other that he qualified it by simply inserting his, the defendant's name, which would not, however, attract the eye of many persons who, finding the number to be the same, the cut and number to coincide, would not consider the name of "McCall," "Theal," "Demorest," or any one else, but wanted and desired a pattern of such a number, and the moment they found and got a number to correspond, they had the article they were in search of. Therefore I think, following the case of *Perry v. Truefitt* (a), the defendant has been employing the very *indicia* by which the plaintiff has been making known his goods, and though I find there is no right in the plaintiff to the exclusive use of the word "Bazaar," yet still the defendant has been infringing, and seriously, on the rights of the plaintiff in what he has done, and therefore the plaintiff is entitled to an injunction restraining the defendant from representing that the

(a) 6 Beav. 66.

goods in the bill referred to are the goods of the plaintiff. 1880.

As the plaintiff has failed in the main branch of the case, that is, as to use of the word "Bazaar," and the defendant has succeeded in that, and the plaintiff has succeeded in the other branch of the case, the relief I give is without costs.

McCall
v.
Theal.

THE ATTORNEY GENERAL OF ONTARIO *ex rel.* BARRETT
V. THE INTERNATIONAL BRIDGE COMPANY.

Injunction—Bridge Company—Railway Company—Costs.

A Company was incorporated for the construction of a bridge across the Niagara River, which was to be "as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains;" and the Company completed such bridge so as to permit of the running of trains across it, but there were not any facilities for the passage of ordinary traffic. The time limited for the completion of the work having elapsed, an information was filed, seeking to restrain the use of the bridge by a Railway Company to whom the same had been leased until put in a condition to be used for ordinary traffic, or the removal of the bridge as a nuisance; and seeking also to compel the Company to permit its use by persons on foot, upon payment of the statutable tolls. It was shewn that the construction of the bridge was such that it could not be adapted to the purposes of general traffic, and that its condition was such that the use thereof by persons on foot even was attended with danger, yet that by a small outlay the bridge could be rendered comparatively safe for that purpose. The Court [SPRAGGE, C.] granted relief, so far as the use of the bridge by persons on foot was concerned; but, in view of the magnitude of the work sought to be removed, compared with the inconvenience to the public, caused by their being unable to use the bridge for ordinary traffic, refused to make a decree to abate the so-called nuisance, and refused the costs of the suit to either party.

The Attorney General of Ontario is the proper officer to complain of a violation of the rights of the public of Ontario, which the Court

1880.

Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.

has the power to restrain, and that incident to such power the Court can prescribe by what means the safety and convenience of the public can be secured in the exercise of those rights. In the exercise of such power, the Court [SPRADGE, C.] directed what alterations were necessary in the construction of the International Bridge, in order to secure the safety of the public while using the same. For this purpose, *The Attorney General* of the Dominion need not be present to protect the rights of the Crown in the Dominion.

Subsequently to the refusal of the injunction, as reported *ante*, vol. xxii., page 298, and after the time limited for the completion of the work for which *The International Bridge Company* had been incorporated, the present information was, on the 25th of January, 1879, filed by *The Attorney General* of Ontario, at the relation of *Robert George Barrett*, setting forth substantially the same facts as are stated in the former case and praying:

Statement.

"(1). That the defendants may be ordered by the Decree of this Honorable Court to abate the said nuisance, and to remove the said structure from the navigable waters of the said river, unless the same is made to conform to the requirements of the said Acts of Parliament. (2). That the said defendants may be restrained from having or maintaining any structure upon or across the said river, or so much thereof as lies within this Province, other than is authorized by the said Acts. (3). Or that the defendants may be restrained from hindering or preventing Her Majesty's subjects from using the foot paths of the said bridge at their will and pleasure, on payment of lawful tolls. (4). That the defendants may be ordered to pay the costs of this suit. (5). That the informant may have such further and other relief in the premises as the nature and circumstances of this case may require," &c.

The cause came on for hearing at the Toronto sittings in the Spring of 1880.

The effect of the evidence taken in the cause, is stated in the judgment.

Mr. J. MacLennan, Q. C., and Mr. McCarthy, Q. C., 1880.

The contention of the informant is that the defendants, *The Bridge Company*, have not, in constructing the bridge complained of, complied with the provisions of the statute authorizing them to do so, what would, but for their charter, have been a nuisance in the channel of the river, which is a navigable river; and that even if they had erected such a structure as would have been the same in all respects as the one required to be constructed by their Act of Incorporation, 20 Vict. ch. 227.

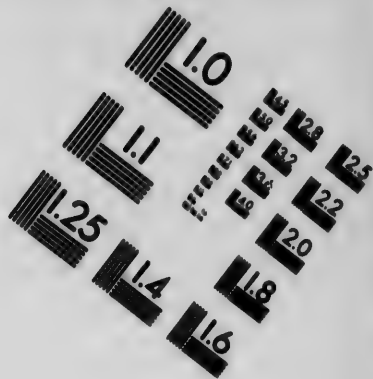
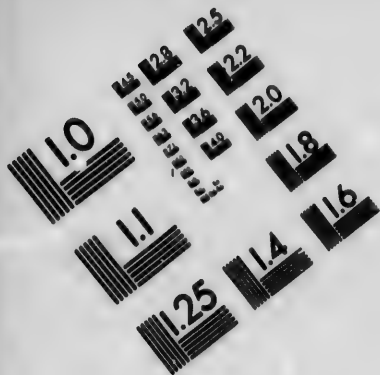
Att'y Gen.
ex rel
Barrett
v.
Inter-
national
Bridge Co.

By that Act it is provided that the bridge shall be built in such a manner as to be suitable for the passage of persons on foot, and also in carriages, as well as for the passage of railway trains.

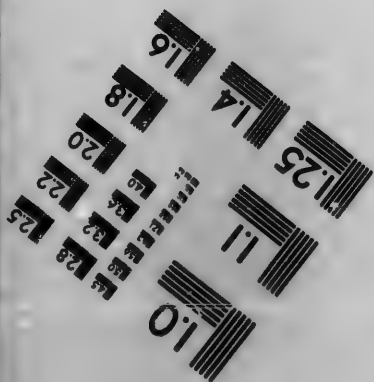
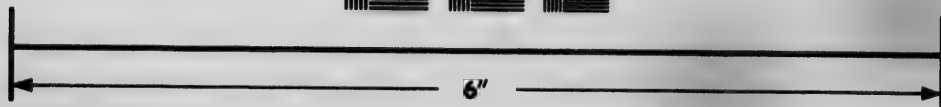
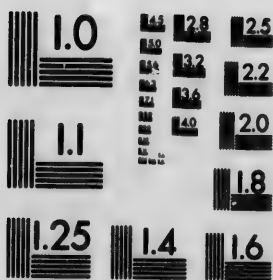
By the second Act, 22 Vict. ch. 124, extending the time for completion of the bridge, the desire of the Legislature to protect the rights of the public is plainly evinced, as by the second section of that statute it is evident the Legislature anticipated that when the bridge was ready for railway traffic it would also be in such a condition as to be used for ordinary foot passengers and general traffic; and although by a later Act—35 Vict. ch. 63, D.—the bridge company were authorized to lease their works to *The Grand Trunk Railway Company*, the rights of the public as respects the use of the bridge are clearly and expressly preserved. That Act while confirming the agreement which had been entered into between the two companies, and which is therein set forth, recited that the structure was to be both a railway and a carriage bridge, and thereby the bridge company agree and bind themselves to construct and complete a bridge which should be capable of being used as a railway and carriage bridge, having on it as well a carriage as a footway; the Legislature evidently intending that the bridge which they had authorized to be built

Argument.





**IMAGE EVALUATION
TEST TARGET (MT-3)**



**Photographic
Sciences
Corporation**

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WEBSTER, N.Y. 14580
(716) 872-4503

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1880. should be suitable for the use of the public whether on foot or in carriages, as well as for the use of railways; and it is equally plain that the bridge company covenanted and agreed with the railway company to construct just such a bridge, which was to be completed in all these respects not later than the first of July, 1872. The evidence shews that the roadway could at a moderate expense be planked over so as to be suitable for carriage and foot traffic as well as railway business.

Att'y Gen.
ex rel.
Barrett
v.
Inter-
National
Bridge Co.

Argument. Here the plans and specifications for the construction of this bridge plainly shew that the company never intended to comply with the terms of their charter, and now when they are required to place the bridge in such a state as to be used by the public for general traffic as well as by foot passengers, they quietly point to the construction of the work, and tell us that it is unsuitable for those purposes; thus in effect taking advantage of their own wrong in not observing the terms and provisions of their Act of Incorporation; and they now say we refuse to let the public use the bridge, although the Legislature clearly intended they should do so; and they refuse to allow even pedestrians to use it, as the centre, they say, is constantly required for use by the railways; and that they cannot allow them to walk along the sides, because by doing so they incur great risk of being injured if not destroyed. This we contend is plainly illegal on the part of the bridge company, who are bound to permit the several kinds of traffic to have a fair and reasonable use of the bridge; and they are not justified in discriminating in favour of the railway company by affording them the sole and exclusive use, we may say possession of the bridge; there is not any reasonable justification for such a course of conduct, and this Court will not permit it to be persevered in.

The defendants by their answer raise the objection that the *Attorney-General* of Ontario is not the proper

person to maintain this suit, and that the information, if filed at all, should have been filed by the *Attorney General* of the Dominion. All that need be said in reference to this objection, is, that the contrary view was upheld in *The Attorney-General The Niagara Falls Bridge Company (a)*, and that decision has been followed ever since, and has never been questioned.

1880.
Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.

Mr. Boyd, Q. C., for the *Grand Trunk Railway Company*; and Mr. Cassels, for the defendants the *International Bridge Company*.

This is really a suit to compel a specific performance of their Act of Incorporation by the defendants *The International Bridge Company*. The information alleges that the defendants have completed a portion of the structure authorized to be placed in the channel of the river by the Act of the Legislature, but complains that they have not complied with all the stipulations and conditions imposed upon the company by the Legislature, because they have omitted or neglected to construct a carriage way or foot way. No objection is raised as to the form or style of the structure so far as it has been carried to full completion. *The Attorney-General* of Ontario is not entitled to call for the fulfilment of duties imposed or created by the Dominion Charter, under which the defendants executed these works. Under the provisions of the Confederation Act, this bridge is a work solely within the jurisdiction and control of the Dominion, and therefore this information if tenable at all, it must be at the instance of the *Attorney-General* of the Dominion; if it were otherwise, and a decree were pronounced in the terms asked for here, the carrying out of such a decree might create serious complications with the United States, in which country the bridge company was incorporated as well as in Canada.

Argument.

(a) 20 Gr. 34.

1880. This case is distinguishable from *The Attorney-General v. The Niagara Falls Bridge Company (a)*, where it was sought to restrain the defendants from preventing the plaintiffs crossing the bridge, but did not in any way seek to interfere with or remove the structure then subsisting. Here unless the whole structure is changed in such a way as strictly to comply with the provisions of the charter, no substantial relief whatever can be afforded the informant; and *The Attorney-General* of Ontario has no *locus standi* entitling him to ask such relief, as the bridge has not been erected upon lands belonging to the Province of Ontario, being solely within the jurisdiction of the Dominion.

Att'y Gen.
ex rel.
Barrett
v
Inter-
national
Bridge Co.

The informant here stops at nothing short of the total removal of this great international work unless the relief asked is granted; alleging that the bridge, as at present built, is a public nuisance; that it stops the waters of the river, which is a navigable stream, and the nuisance so caused by it cannot be abated otherwise than by the complete removal of one of the greatest works of the age, and which has been incontrovertibly shewn to be not a nuisance or source of inconvenience to persons residing at or near the bridge, and the benefits to the public at large are very great; so that instead of being a benefit, the removal of the work would really be a calamity to the public. On this ground, if no other existed, the relief prayed should be refused, and the information dismissed.

Argument.

Raphael v. The Thames Valley R. W. Co. (b), *The Attorney-General v. The Mid-Kent R. W. Co. (c)*, *The Attorney-General v. Ely (d)*, and *Krehl v. Burrell (e)*, were referred to by counsel.

(a) 20 Gr. 34, 490.

(b) L. R. 2 Ch. 147.

(c) L. R. 3 Ch. 100.

(d) L. R. 4 Ch. 149.

(e) L. R. 7 Ch. Div. 551.

SPRAGGE, C.—This information complains of the construction of the International Bridge, in its not being so constructed as to admit of its use by ordinary vehicles, in that respect not being such a bridge as the company, by their Act of incorporation, were authorized to construct, sec. 19 of the Act enacting "that the said bridge shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains." In paragraph 17 the complaint is, that the defendants have not constructed a carriage way, and refuse to construct any bridge by persons in carriages. Paragraph 20 alleges that there are no serious engineering difficulties in the way of the company complying with the requirement of the Act in that respect; and paragraph 21 alleges that "the existing bridge is so constructed that with little comparative expense the same could be adapted to permit of passengers using it in ordinary carriages as well as by railway trains."

1880.
Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.
Sept. 1st.

Judgment.

In respect to this branch of the case, I may say at once that the allegations contained in paragraphs 20 and 21 (a) are not supported by the evidence, but on the contrary, it is shewn by the best evidence that what is alleged and what is suggested in these paragraphs is altogether incorrect.

To the relator, indeed, it seemed, as appears by that gentleman's evidence, that what is suggested is perfectly feasible; but he does not profess to be scientific, or to be at all conversant with the working and management of railways. Col. Gzowski, a civil engineer of

(a) These paragraphs were as follows: "20. There are no serious engineering or other difficulties existing to prevent the said defendants from complying with the said Acts in constructing the said Bridge so as to admit of the passage of persons in ordinary carriages as well as on foot over the same. 21. The existing bridge is so constructed that with little comparative expense the same could be adapted to permit of passengers using it in ordinary carriages as well as by railway trains."

1880.
Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.

great ability and experience, and a man eminently practical, and by whom the bridge in question was built, is called for the relator, and pronounces emphatically against the plan proposed by the relator as a solution of the difficulty; and shews how it is that it is impracticable.

Judgment.

It appears from Col. *Gzowski's* evidence, and from that of Mr. *Hannaford*, the engineer at the bridge, that the bridge was built for railway traffic only, and that the plans and specifications by which it was built shew this. That it should have been built for the use of passengers in carriages and on foot, as prescribed by the Act, as well as for railway traffic, must I think, be conceded; but it has not been so built; and there are two very sufficient reasons why the present structure cannot, as it is, be used and cannot be adapted to that purpose. One is, the engineering difficulties in the way of its being so used or adapted; the other is, that the railway traffic is so great that the bridge could not be used for both carriage and railway traffic, especially when the interruption to traffic by the raising of the drawbridge for the passage of vessels is taken into account. From ninety to one hundred and forty trains pass over the bridge daily; the number of cars attached to the trains being from five to thirty to each train. Mr. *Hannaford* puts the case thus: If the railway had the right of traffic it would rarely be possible to use the bridge for ordinary carriages; while if ordinary carriages had the right of traffic, it would amount to closing the bridge for railway traffic. The evidence of Col. *Gzowski* and Mr. *Hannaford* is confirmed by that of Mr. *Spicer*, the general superintendent of the Grand Trunk Railway Company, and is, I think, conclusive upon that point.

Against this I have no scientific evidence whatever, nor have I the evidence of any one conversant with the working of railways to controvert the evidence of the gentlemen called upon this point by the defen-

dants. Upon the evidence before me I feel that to direct what is asked upon this head would be directing that which is impracticable. No evidence is given of the extent to which the bridge would be used if open for use by carriages; but I take it that it would be of very trifling importance compared to the importance of its use for railway traffic.

1880.
Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.

The information asks, besides the relief to which I have adverted, that the defendants be ordered to abate what it styles a nuisance, i.e., to remove the bridge, the present structure, from the navigable waters of the Niagara river, unless the same is made to conform to the requirements of the Act.

The present structure cannot be made to conform to the requirements of the Act, and it is not shewn that it is practicable to construct a carriage way under it (as is done in the case of the suspension bridge below the Falls of Niagara), or beside it, or appended to, or connected with it in any way; or that the defendants, or any of them, have the pecuniary means or the legal authority at this time to make such a structure; or that it is a work the execution of which this Court or a Court of Common Law, by *mandamus*, would direct. Such a direction as is asked would be at once fatuous, in the sense of being impotent, without force, illusory, and futile, as well as most mischievous in its consequences. It is not, at any rate, now an open question. The like application has been negatived more than once in this Court, and if it were before me now for the first time I should certainly refuse to make such a decree.

Judgment.

I come now to another branch of the case made by the information. Paragraph fifteen alleges that the bridge, constructed as it is, is adapted to the use of foot passengers; and paragraph seventeen says that although the bridge is adapted thereto, and although the defendants use the roadway of the bridge for their servants and employes to cross and recross, they refuse to allow

1880.
 Att'y Gen.
 ex rel.
 Barrett
 v.
 Inter-
 national
 Bridge Co.

the use thereof and they prevent persons on foot from crossing the bridge, although willing and offering to pay the lawful tolls provided by the Act. There is no question that the defendants do not permit the use of the bridge to foot passengers; their granting passes is exceptional; they say that the bridge is not adapted for use by foot passengers, and this is probably correct in the sense that it was not constructed with a view to its being used by foot passengers; but there is a space between the track and the outside railing of the bridge, which is used by the servants of the defendants in passing to and fro, affording more than sufficient space, when trains are not passing, for its use by ordinary foot passengers; but some of the cars used with these trains are of such width as to diminish the space on each side to some three feet six inches; and the space is further practically diminished by the oscillation of the cars when in motion to the extent of about six inches. So far as space is concerned, there would still be sufficient room for the use of the bridge by passengers in single file, even when abreast of the widest cars, and those cars in motion.

Judgment.

What, then, are the difficulties in the way of the use of the bridge by ordinary foot passengers, and do the defendants shew any sufficient reason for preventing such use?

The difficulties set up by the defendants, as disclosed in evidence, are not that they, the defendants, would have any serious difficulty in allowing the use of the bridge to foot passengers, or that such use would at all interfere with railway traffic. The difficulty consists rather in apprehended danger to the foot passengers themselves. Col. *Gzowski*, Mr. *Hannaford*, and Mr. *Spicer*, all speak of it as a "nervous thing" to cross the bridge; Mr. *Spicer* as "confusing" to cross while trains are in motion on the bridge; Mr. *Hannaford* as dangerous from the effects of the wind, which he says is at times so violent on the bridge that

a person could not keep his legs without holding on to something. 1880.

On the other hand, the relator speaks of crossing as unattended with difficulty, and *Richard Hinton* and *Henry Emrie*, residents of the village of Victoria, on the Canada side of the river, say that they have often crossed the bridge; that it is safe to do so; and *Emrie* says safe on the darkest night. I can readily understand that in the case of a nervous person crossing while a train is in motion, or in very boisterous weather, it would be confusing, and not unattended with danger; but one great reason of this no doubt is, that there is no fence or protection of any kind between the track and the outside railing of the bridge. Mr. *Hannaford*, who was examined upon this point, says that a fence might be made between the track and the outside railing, and tools made to work inside the fence, the present tools being long for the purpose.

Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.

This evidently would diminish the danger; and the sense of security—from the fact of the fence being there—would diminish the nervous apprehension of danger, which is itself often a source of danger. I take it that the reason why no fence has hitherto been placed where Mr. *Hannaford* says a fence might be placed is not far to seek. I take it to be that the defendants have wished to discourage the use of the bridge by foot passengers, because of the risk of accident to those crossing; and that, therefore, so far from affording facilities for crossing, they would prevent it in all but exceptional cases; and if the bridge were a private enterprise, with proprietors having a right to do with it as they pleased, no one could blame them for not allowing its use to foot passengers otherwise than according to their own regulations. But that is not the position of the bridge company, or of those having authority to exercise the powers committed to the bridge company by the Legislature. The company Judgment.

1880. was not authorized to build whatever kind of bridge it might think fit, but the Act directed that the bridge to be built should be a bridge "as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains." That was the duty cast upon the company by the Legislature if the company built the bridge; and so far as the bridge built by the company fell short of the requirements of the bridge authorized by the Legislature, so far has the company failed in the duty cast upon it.

Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.

Judgment

For reasons already explained in this and other cases, the general public is without remedy in the Courts, so far as a carriage-way is concerned, but the structure built by the company, although not built as it ought to have been for the use of foot passengers, is yet as it is not altogether unfit for that purpose, and it is practicable, and is not even difficult, for the company to render it now reasonably fit for use by foot passengers. The company is not excusable in not having built such a bridge as alone they had authority to build; and they are altogether without excuse in not having adapted the structure they have erected, as far as it is possible to adapt it, to the use of foot passengers; subject, of course, to any reasonable regulations the defendants may make in regard to its use.

What has been their duty in this regard, is their duty now. My own idea of what is proper is that a very strong fence should be built, at such a distance from the track as to be beyond the oscillation of the Pullman cars, which are, I believe, wider than ordinary passenger cars; and I myself see no reason why this should not be done on each side of the track. As to these points, however, I will, if either party desires it, direct that an expert shall examine and report upon what is feasible and proper; or refer it to the Master to do so.

It may be that after all is done that can be done for

safety, the crossing of the bridge by foot passengers will not be altogether unattended with danger, especially to those of a nervous temperament; but the danger is not of such a character as to warrant the bridge company in preventing the use of the bridge by foot passengers, and in failing to use all proper appliances for their safety in crossing, or of such a character as to make it proper for this Court to refuse to interfere, and to require the defendants to do what, as far as it can be done, they were bound to do under their Act of incorporation for the convenience of the general public.

1880.

Att'y Gen.
ex rel.
Barrett
v.
International
Bridge Co.

It was objected at the hearing that the Attorney-General of Ontario is not the proper party to file this information, but that if any one it should be the Attorney-General of the Dominion. To a certain extent that point was disposed of by Mr. Justice Strong, in *Attorney-General v. Niagara Falls Bridge Company (a)*, where the propriety of such an information by the Attorney-General of the Province was put by the learned Judge upon this ground: "The Attorney-General files this information, not complaining of any injury to property vested in the Crown as representing the Government of the Dominion, but in respect of a violation of the rights of the public of Ontario." So far, therefore, as the prevention of the public to cross on foot is concerned it is a violation of the rights of the public of Ontario; but it is objected that the Court can go no further at the instance of the Provincial Attorney-General; that the Court cannot direct any work to be done on the bridge; that that can only be obtained upon information filed by the Attorney-General of the Dominion; in other words, that although a fence upon this bridge may be necessary for the safety of the public using the bridge, the use of which is a public right which the defendants have violated, the Attor-

Judgment.

(a) 20 Gr. at 37.

1880.
 Att'y Gen.
 ex rel.
 Barrett
 v.
 Inter-
 national
 Bridge Co.

ney-General, who is the proper officer to represent the public to vindicate this public right, cannot be heard to point out the mode in which he conceives the safety of the public in the exercise of its right ought to be secured. Or it may be put thus: The Attorney-General having shewn upon this information that the defendants refuse to the public the exercise of a right in respect of which the Attorney-General is the proper officer to represent that public, the Court must content itself with a direction that the defendants shall not interfere with the public in the exercise of that right, and is powerless to go further, and to prescribe by what means the safety and convenience of the public are to be secured in the exercise of that right. It is not suggested that any right of the Crown, as represented by the Government of the Dominion, would be interfered with, or that the bridge would be injured by the doing of that which I propose to direct. The power to make such direction is incident, as I conceive, to the power to direct the defendants to permit the exercise of the right, and it may be assumed that the presence of the Attorney-General of the Dominion is not necessary to prevent the Court from making an order prejudicial to the rights of the Crown in the Dominion while vindicating, at the instance of the proper officer, the right of the public in the Province.

Judgment.

It is not objected in this case, by answer or in argument, that the defendants have not such control of the bridge as to enable them to carry out what this Court might direct in regard to the exercise of the right of foot passengers to cross the bridge.

I do not myself entertain any doubt of the right of this Court to make such a decree as I propose to make. Of the right to enjoin the defendants from preventing the use of the bridge by foot passengers there can be no doubt, and, in my opinion, the Court has jurisdiction to go further. Without putting it upon the ground upon which it was put by *Strong, J.*, in *The*

Attorney-General v. Niagara Falls Bridge Company,
(a) the execution of trusts, and the fulfilment of con-
tracts, it is, in my judgment, a case in which a proper
remedy, not to say the proper remedy, is by *mandamus*.

1880.
Att'y Gen.
ex rel.
Barrett
v.
Inter-
national
Bridge Co.

I have held, in *Marsh v. Huron College* (b), that this
Court has jurisdiction in all cases in which *mandamus*
is the proper remedy, and that in dealing with such
cases the Court will, ordinarily at any rate, take cog-
nizance of them by its usual course of procedure. I
refer to that case without repeating the reasons which
led me to that conclusion.

I think the proper course as to the disposition of
the costs is to direct that each party pay his own
costs.

(a) 20 Gr. 490.

(b) 27 Gr. 605.

1881.

MITCHELL V. STRATHY.

*Mortgagor and mortgagee—Disputed signatures—Res judicata—
Erroneous decree.*

The Court will not assist in carrying on or perpetuating error, by enforcing an erroneous decree.

S. being the holder of two mortgages, brought ejectment thereon, when the genuineness of the signatures to the instruments was disputed, notwithstanding which he recovered judgment in that action, and subsequently instituted proceedings in this Court seeking to obtain a sale of the mortgage premises and the usual order for deficiency. Owing to the extremely contradictory evidence adduced at the hearing, the Court [SPRAGGE, C.] refused to make the decree as asked, holding the evidence insufficient to establish the execution of the mortgages, as the plaintiff was bound to do, and dismissed the bill with costs; but without prejudice to *S.* filing another bill if so advised, within twelve months from the date of that decree. After the lapse of more than twelve months the mortgagor filed a bill seeking to have the mortgages delivered up to be cancelled:

Held, that if the strict construction of such decree was that the point was *res judicata* it was erroneous, and the Court [SPRAGGE, C.] refusing to enforce it in this proceeding by making a decree in favour of the plaintiff, dismissed the bill with costs.

Statement. The bill in this case was filed by *Margaret Mitchell* against *James B. Strathy*, setting forth that in December, 1859, the defendant, upon the pretence of being mortgagee under two mortgages, alleged to be executed by the plaintiff, entered into possession of a lot of land in the city of London, containing half an acre; and on the 14th of June, 1871, the said *Strathy* filed a bill of complaint in this Court against the present plaintiff, claiming, as such mortgagee, under two mortgages dated respectively the 13th of January, 1857, and the 13th of January, 1858, seeking to foreclose the plaintiff's interest in said lot in case of default in payment of such mortgages, to which bill the said plaintiff filed her answer on the 15th September, 1871, denying the execution by her of said mortgages, and praying a dismissal of the said bill of complaint.

The bill further alleged that after issue was joined in that cause evidence was taken and on the hearing, 3rd October, 1872, the Court pronounced a decree dismissing the said bill, with costs; but declared that such decree was made without prejudice to the right of *Strathy* to file a new bill if so advised, he filing such new bill within twelve months from the date of the said decree; and that the said proceedings had been all duly enrolled; and the plaintiff submitted that the said decree was final and conclusive between the parties on the question of the execution of the said pretended mortgages; notwithstanding, which the said *Strathy* continued to retain possession of the land and refused to give possession thereof to the plaintiff; and the said pretended mortgages had been registered, and thus formed a cloud upon the title of the plaintiff. The prayer was that the defendant *Strathy* might be ordered to deliver up possession to the plaintiff, and that the mortgages might be released and delivered up to be cancelled; that an account might be taken of the rents and profits received by defendant; an injunction to restrain him from proceeding at law; and for further and other relief.

1880.
Mitchell
v.
Strathy.

Statement.

The defendant answered the bill, admitting substantially the statements of the bill, but insisting that the bill by the present defendant against the present plaintiff had not been "dismissed on the ground that the said mortgages were not executed by the plaintiff, but on the ground that the evidence was insufficient to establish the *factum* of the execution of the said mortgages."

The other facts are set out in the judgment.

The cause came on for hearing on bill and answer.

Mr. James MacLennan, Q.C., for the plaintiff, contended that the decree of dismissal in the former suit was quite sufficient to entitle the plaintiff here to the decree asked; the issue in that suit having been as to

1880. ^{Mitchell}
v. ^{Strathy.} the genuineness of the documents sued on, and that fact having been negatived, it was not necessary for the plaintiff here to do more than produce the decree in the former suit. The question indeed, he submitted, might be looked upon as *res judicata*.

Mr. Bayly, for the defendant. The result of the former suit was simply that the allegations of the bill were not proven, and this would seem to be a bill to carry the former decree into execution. Suppose the former suit had been a trial at law and the same view taken of the evidence as here, the result would have been that the plaintiff would have been nonsuited. No greater effect can be given to a decree which was intended simply to carry out the view of the Court in finding that the deeds were not sufficiently established.

In addition to the cases mentioned in the judgment. *Wilkinson v. Kirby* (a), *Trevivan v. Lawrence* (b), *Langmead v. Maple* (c), *Borrowdale v. Tuttle* (d), were referred to by counsel.

March 24th.

Judgment.

SPRAGGE, C.—A bill was filed several years ago by the present defendant against the present plaintiff. The bill was filed upon two mortgages, alleged to have been executed by the then defendant to the then plaintiff *Strathy*, and prayed a sale, and order on the then defendant, Miss *Mitchell*, for payment of the deficiency. *Strathy* had recovered possession by ejectment upon one of the mortgages. In that action the genuineness of the signature of Miss *Mitchell* to the mortgages was denied, but the verdict and judgment were against her.

In the bill filed by *Strathy* in this Court, the genuineness of the signature of Miss *Mitchell* to both mortgages was denied, and a great deal of evidence on both sides was given. The case gave me a great deal of

(a) 15 C. B. 430.

(c) 18 C. B. N. S. 225.

(b) Smith's L. C. 691.

(d) 5 Allen, 377.

anxious consideration. I gave a written judgment (a), 1880. in which I reviewed the evidence at considerable length and summed up the result as follows: "I have weighed all the evidence and all the circumstances of this case long and anxiously, and have considered them again and again. The inclination of my opinion has, I confess, vibrated a good deal; and I have felt from the first that the question was involved in so much uncertainty that I could not but feel, whichever way I decided, that I should feel less satisfied that I had come to a right conclusion, than I have felt in perhaps any case that has ever come before me. I must at last put it upon this, that the affirmative of the issue is upon the plaintiff, and looking at all the evidence *pro* and *con*. I cannot hold it sufficient to establish against the defendant the *factum* of execution the documents, including in the *factum* of execution the manual act of signing and sealing, and the mental assent of the party executing. I cannot do otherwise than dismiss the plaintiff's bill, and it must be with costs." Judgment.

Mitchell
v.
Strathy.

The answer in this suit takes the ground that is taken in the judgment, as the ground upon which the bill was dismissed, viz., that although the bill was dismissed with costs, it was not dismissed on the ground that the said mortgages were not executed by the now plaintiff, but on the ground that the evidence was insufficient to establish the *factum* of the execution of the said mortgages against the now plaintiff.

This cause being heard upon bill and answer, it is to be taken as a fact in this case, that the bill in the former suit was dismissed on the ground stated.

The decree drawn up simply dismisses the bill, with costs; but without prejudice, as directed by me, to the filing of a new bill within a year.

What is claimed in the present suit is that the decree in the former suit "was final and conclusive between

(a) Not reported.

1880. the plaintiff and the defendant on the question of the execution of the said pretended mortgages," and what is asked in this suit is:

Mitchell
v.
Strathy.

(1) That the defendant may be ordered to deliver up possession of the said premises to the plaintiff; (2) that the said pretended mortgages may be released, and delivered up to be cancelled; (3) that an account may be taken of the rents and profits of the said premises since the occupation thereof by the defendant; (4) that the defendant may be restrained by the order and injunction of this honourable Court from proceeding at law, on the covenants in the said pretended mortgages.

Without the former suit, and the dismissal of the plaintiff's bill in that suit, there is nothing to give to the plaintiff in this suit the relief asked by her bill. Without that, she has no *locus standi*.

Her position then is this, or it is nothing: that I am bound to take the decree as establishing that the mortgages in question are not in fact genuine, but spurious documents; although it appears in this suit that I did not find that to be the fact; and although in giving judgment in the case I expressly refused to find such to be the fact. It would be giving an effect to the decree not in accordance with, but in discordance with the judgment upon which the decree is founded.

Judgment.

Mr. *MacLennan* contends that the decree is conclusive in favour of the fact that he contends for. I have looked at the cases which he cites upon that point. I do not think that they establish that the decree is necessarily conclusive; but I abstain from pointing out the distinctions between those cases, and this for two reasons: first, that it was the plaintiff in this suit that took out that decree, and now seeks to use, and asks the assistance of the Court to use it for a purpose at variance with its declared intent, and meaning, and object; and I feel clear that she cannot be permitted to do this. The other reason is, that assuming for a

moment that the effect of a decree dismissing a bill is what it is contended to be, then this decree is erroneous, and there is no lack of authority to shew that the Court will not carry out an erroneous decree.

1880.
Mitchell
v.
Strathy.

It was refused by Lord Chancellor *Sugden*, in Ireland, in *O'Connell v. McNamara* (a), where he said: "I do not understand the rule to be that this Court is bound to carry into execution an erroneous decree; on the contrary, I apprehend that when a party comes into this Court, asking for the benefit of a former decree, he must be prepared to shew, if the case requires it, that such decree was right." And after referring to *Hamilton v. Houghton* (b), and the language of Lord *Eldon* in that case, he proceeded: "It is true that as this case now comes before the Court, I cannot order the decree to be amended; but as I am not bound to carry on or perpetuate error, I will not give the plaintiff the benefit of the former proceedings, unless he consents to take the proper decree." If in the former case the decree, simply as it is, has the meaning and effect contended for, it should, if the defendant in that suit desires to make any use of it, be qualified by words negating its being taken to establish the fact that the mortgages in question were not executed by the defendant in that suit, but as only establishing that it was not proved in that suit that they were so executed. The distinction is quite plain, and is similar to that taken by Chief Justice *De Grey*, in the *Duchess of Kingston's Case* (c), a case cited by Mr. *MacLennan*. "So that admitting the sentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all."

Judgment.

Hamilton v. Houghton was referred to at considerable length in a case in this Court: *Commercial Bank v.*

(a) 3 D. & Wn. 412.

(b) 2 Bli. O. S. 169.

(c) 2 Smith, L. C. 687.

1880. *Graham* (a), by the late learned Chancellor, Mr. Blake, as were also *O'Connell v. McNamara* (b), *Montgomery v. Southwell*, (c) and other cases. All these cases established the doctrine that the Court will refuse to carry into execution an erroneous decree. I may add that if no authorities upon the point had been found I should certainly have refused to be made the instrument of carrying into execution a decree at variance with the judgment that I had pronounced in the cause.

Since the argument in this cause I have read over the judgment that I gave in the former suit, and I may say that if in that suit cross-relief had been asked to the effect of the prayer of the bill in this suit, or indeed if any active relief had been asked in that suit for the then defendant, I should most certainly have refused it. I felt then as I do now, that the utmost that I could properly say for the defence was, that the plaintiff's evidence was insufficient to establish the fact of the execution of the mortgages.

The plaintiff's bill in this suit is dismissed, and it must be with costs.

NOTE.—This case has been in type since about the 18th of May last, but unfortunately in the press of other matter it escaped attention, and would not now have been published had it not been that the Chancellor, when delivering judgment in *Adamson v. Adamson*, on the 15th of February last, called the attention of the Reporter to it.—A. G.

(a) 4 Gr. 419.

(b) 2 Dr. & Wn. 412.

(c) 2 C. & L. 263.

1880.

BANK OF TORONTO V. BEAVER AND TORONTO MUTUAL
INSURANCE COMPANY.

Mutual insurance company—Debentures for money borrowed—Ultra vires—Vict. ch. 52 sec. 12, O.

Trustees being indebted to the plaintiffs and holding stock in the defendants' company assigned the stock to the latter in consideration of a sum expressed to be paid by them for the trustees to the plaintiffs. The sum was paid by the issue of the defendants' debenture to the plaintiffs.

Held, that the transactions did not constitute a "loan of money" from the plaintiffs to the defendants within the meaning of 31 Vict. ch. 52, sec. 12 (O.,) and that the issue of the debenture was therefore *ultra vires*.

Hearing on further directions.

Mr. J. Hoskin, Q. C., and Mr. Creelman, for the plaintiffs.

Mr. Osler, Q. C., Mr. Cattnach, Mr. Huson Murray, Mr. Moss, Mr. Mulock, Mr. W. Cassels, Mr. Badgerow, Mr. Burwick, Mr. Marsh, and Mr. Symons, for the several parties interested as defendants.

The facts appear in the judgment.

SPRAGGE, C.—Mr. Osler, for defendant *Burns*, con- Dec. 8th.
tends that the plaintiffs' bill must be dismissed, on the ground that they have no *locus standi* in Court.

The cause of suit of the plaintiffs is upon a debenture for \$5,800, dated the 2nd of January, 1877, whereby Judgment.
the defendants acknowledge to owe that sum to the bank, the plaintiffs.

The defendants' authority for the issue of debentures is section 12 of the Ontario Act, 31 Vict. ch. 52. This authorizes the issue of "debentures in favour of any person, firm, banking or other company, for the loan of money." This must mean a loan of money to the de-

1880. *Bank of Toronto v. Beaver and Toronto Mutual Ins. Co.* defendants, and the question is, whether there was a loan of money by the bank to the insurance company, and this debenture given therefor.

The Master's report sets out *in extenso* the transactions which resulted in the issue of this debenture. The bank, prior to the issue of the debenture, was the holder of a bill of exchange drawn by the late Mr. J. H. Cameron upon, and accepted by the trustees of his wife's marriage settlement; upon which bill there remained due \$5,000. The trustees were holders of guarantee stock in the defendants' company to the amount of \$18,000, upon which \$9,000 had been paid, and this stock was transferred by the trustees to, and accepted by the bank as collateral security for the payment of the bill of exchange. So far as to \$5,000 of the debenture: the balance, \$800, was made up in this way. The bank were holders, besides the bill of exchange for \$5,000, of a promissory note for \$800 made by the defendants, the insurance company, and indorsed by the same trustees who were acceptors of the bill of exchange; the whole of this note was due with interest. Upon this note there was a direct liability from the insurance company to the bank, at least *prima facie*; but what was the consideration of that note does not appear. The inference to be drawn from its form is not that it was given for a loan of money from the bank to the insurance company, and I should assume that if such were the consideration it would have been shewn in the Master's office, and the Master asked to report accordingly. The Master reports as connected with this transaction a bill of exchange for \$5,000 held by the Bank of Montreal. It does not alter the character of the dealing upon which the debenture was issued.

The trustees assigned to the insurance company upon certain terms, which it is not necessary to notice, the stock held by them in the company, the consideration expressed being \$10,800 paid by the company for the

trustees, *i. e.*, \$3,000 paid to the Bank of Montreal, and \$5,800 paid to the plaintiffs; and the directors of the defendant company authorized, by resolution, the issue of the debenture held by the plaintiffs; and, as appears by another part of the Master's report, a debenture for \$5,000 was issued in favour of the Bank of Montreal.

I confine myself, however, to the debenture issued by the defendants to the plaintiffs. And the transaction upon which it was founded being what I have stated, I can find in it no loan of money from the bank to the insurance company: upon which alone, as I read the statute, the directors of the company were authorized to issue debentures. My conclusion is, that the issue of this debenture was *ultra vires*.

It is contended that the defendants are, one and all of them, too late in making this objection to the *locus standi* of the plaintiffs. But I retain upon that point also the opinion that I expressed at the hearing, that the decree made no adjudication upon the rights of any of the parties; that it only directed inquiries with a view to a future adjudication upon those rights, and that it is now open to any party to contest them, just as it would have been if what has been found by the Master had been established by evidence at the hearing of the cause. The form of the decree and what is directed by it shew this, I think, very clearly.

The cause now coming on for adjudication upon the rights of the parties, one of the defendants submits that upon the facts before the Court the plaintiffs have no *locus standi*, and asks that the bill be dismissed. He could, of course, ask it only as to himself; but the other defendants join in the contention, and also ask for the dismissal of the bill. In my opinion that is their right.

As to the costs. I do not know that the defendants could have taken the objection at an earlier stage of the proceedings than they did. They could not have demurred, for the bill alleged that the debenture was

1880.

Bank of
Toronto
v.
Beaver and
Toronto
Mutual
Ins. Co.

Judgment.

1880. given for money lent and advanced by the plaintiffs to the company, in which case it would not be, *primæ facie* at least, *ultra vires*. So far as appears the true facts were first disclosed in the Master's Office.

Bank of
Toronto
v.
Beaver and
Toronto
Mutual
Ins. Co.

The inquiries have, however, placed upon record a great many facts, besides those immediately between the plaintiffs and the insurance company, and which may probably be valuable to other parties in the suit in the ascertainment of their respective rights and interests. It would not be just to compel the plaintiffs to pay the costs of this class of inquiries.

I cannot give to the plaintiffs any costs, but under the circumstances it will be just not to give any costs against them.

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1880.

DAVIDSON V. PAPPS.

*Partnership—Deceased partner—Insolvency of surviving partners—
Assignment to and by executrix of deceased partner.*

Upon the death of one member of a firm, and the subsequent insolvency of the surviving partners, the joint estate passes to their assignee in insolvency. But where the capital of surviving partners having been lost, they, while the estate was supposed to be solvent, conveyed the same to a trustee for creditors upon the request of the executrix of a deceased partner, in consideration of a release by her from all liabilities; and the executrix afterwards, upon obtaining probate, conveyed her interest to the trustee; and subsequently, through a shrinkage in value, the estate became insufficient to meet the liabilities, it was

Held, that by the assignment to the trustee, at the request of the executrix, for valuable consideration, they had parted with all interest in the estate, and nothing passed to the plaintiff as assignee under proceedings in insolvency taken on the supposition that the assignment to the trustee was an act of insolvency; and that the assignment to the trustee not being questioned on the ground of fraud, the assignee of the survivors was precluded from any inquiry.

Thomas C. Kerr, W. F. Findlay, and Alexander Stephen were carrying on business under the name of *T. C. Kerr & Co.*, and on the 21st of November, 1878, *T. C. Kerr* died, leaving his wife, *C. E. Kerr*, his sole executrix under his will. The partnership estate was supposed to be solvent, but the capital of the surviving partners having been lost, and the executrix entitled to any surplus there might be, it was deemed advisable that the estate should be conveyed to her in consideration of her releasing the surviving partners from any liability to contribute. An agreement was drawn up and executed on the 20th of March, 1879, whereby the assets were conveyed at her request to the defendant *Papps*, her solicitor, to realise and distribute among the creditors, in accordance with the provisions of the Insolvent Act of 1875. On the 12th of May, 1879, by another deed the executrix assigned all her interest as executrix to the defendant *Papps* upon the same trust.

Argument.

1880. This was agreed to by a large number of the creditors, though some few disapproved of it.

Davidson
v.
Papps.

On the last mentioned date a writ of attachment was issued under the Insolvent Act against the estate and effects of the surviving partners, and the plaintiff, as assignee in insolvency, claimed to be entitled to and to administer the estate, relying on the assignment of the 20th of March as an act of insolvency within section 2, sub-sec. j, of the Insolvent Act of 1875.

Mr. Blake, Q. C., and Mr. Laidlaw, for the plaintiff.

Mr. Edward Martin, Q. C., for the defendants.

Sept. 5th. PROUDFOOT, V.C.—Surviving partners, it seems, have authority to collect assets, and perhaps to dispose of them for the purpose of winding up the estate: *Bilton v. Blakely* (a), *Bolckow v. Foster* (b), *Buckley v. Barber* (c), disapproved of by James, L. J., in *Taylor v. Taylor* (d).

Judgment.

It is admitted that the executor cannot be made an insolvent in conjunction with the surviving partners, but it is said that upon the insolvency of the survivors the assignee is entitled to the joint estate. The recent cases in England, under the Bankruptcy Act of 1869, are no guides to us, for the 72nd section of that Act confers powers on the Bankrupt Court there that our Insolvent Court does not possess. There is no section in our Act of 1875 equivalent to that section 72. It was under it that *Ex parte Gordon* (e), and *Morly v. White* (f), were decided, which held that under this section "a novelty in the law of bankruptcy," questions between the estates of a bankrupt and deceased partner were to be decided in the Bankrupt Court.

The effect of the insolvency of a surviving partner

(a) 7 Gr. 315.

(c) 6 Exch. 164.

(e) L. R. 8 Ch. 555.

(b) 24 Gr. 333.

(d) 1 Lind. Part. 4 ed., 666.

(f) L. R. 8 Ch. 214.

1880.

Davidson
v.
Pappe.

(1875, sec. 40) is to give to the assignee all the rights of action and remedies against the other partners which the insolvent could have, and (sec. 16) vests in the assignee all right, power, title, and interest, which the insolvent had in and to any real and personal property, &c. It is difficult to understand from the reports what was the precise effect of a commission of bankruptcy against a surviving partner. But it appears that a commission is more powerful than an execution at law. The latter would only attach upon the interest of the insolvent, that is his share in the firm, but in bankruptcy the rule is otherwise, and the partnership fund is to be distributed as far as it will go: *Hunkey v. Garratt* (a). And in *Addis v. Knight* (b), a commission issued against a surviving partner, under which he was declared bankrupt, and an assignment made of his separate estate, and also of the partnership estate. This is necessary on account of the ranking of the joint and separate debts. In *Ex parte Smith* (c), joint creditors obtained a commission against a partner, and his co-partner having died a few days afterwards, another commission was obtained by a joint creditor against him as surviving partner. This case is quoted by Mr. Lindley (d), as authority for the following passage: "Where all the partners save one are dead, the survivor can be made bankrupt; and although all the joint property may, in one sense, be vested in him by survivorship, a petition filed against him alone before his co-partners die will not be superseded in favour of a petition filed against him alone since their death." I should suppose, therefore, that Lord Loughborough thought that nothing more would pass to the assignee under the commission against a surviving partner than under a separate commission. There was no decision in *Addis v. Knight* on the point mentioned above, but

Judgment.

(a) 1 Ves. J. 236, *Sumner's* ed., and note 3.

(b) 2 Mer. 117.

(c) 5 Ves. 295.

(d) 3rd ed., 1139.

1880. the proceedings under the commission are stated as proceeding in a usual course, and are treated apparently as regular. The report in *Ex parte Smith* is obscure.

Davidson
v.
Pappe.

In *Everitt v. Backhouse* (a), Sir W. Grant, M.R., says: "It seems at first strange that, because one of two partners happens to be a bankrupt, the whole of the joint property shall be administered in the same manner as if both were bankrupts. That, however, is what is frequently done upon petition in bankruptcy." And in *Barker v. Goodair* (b), Lord Eldon says: "In the absence of a solvent partner the assignees shall take the joint property, and deal with it as the partner himself ought to have dealt with it; paying all the joint creditors equally, as far as the joint property goes; and applying the surplus, if any, under all the equities subsisting between the parties themselves. This is done here every day." And Mr. Lindley says: "In general it is more expeditious and otherwise advantageous to wind up the affairs of partners under a joint adjudication against the firm, than under one or more separate adjudications against the members thereof individually"; shewing that under separate commissions the joint estate could be disposed of (c). And if that could be done where all the partners were living, it would appear to be *a fortiori* the case where all were dead.

Judgment.

I shall hold, therefore, that under the insolvency of surviving partners the joint estate passes to and is to be administered by the assignees.

But it appears that the capital of both the surviving partners had been extinguished, and they had no interest in the partnership left; and on the 20th of March, 1879, they agreed with the executrix of the deceased to transfer the assets of the partnership as she should direct, in consideration of being released and discharged

(a) 10 Ves. 94.

(b) 11 Ves. 78.

(c) *Lind. Part.*, 4th ed., 1102.

from all liability for any balance which, on the winding-up of the estate, might be found due from them to the estate after payment of all the liabilities of the firm. And they assigned to the executrix every interest which they had, or thereafter might have, in the assets of the firm or in any way relating thereto, and all right for an account, so as to vest in her all the interest, benefit, or advantage, they might derive from or out of the estate. There were separate deeds to that effect executed by the survivors, but the effect of each is practically the same.

1880.

Davidson
v.
Pappa.

In pursuance of this agreement, and contemporaneously with it, the surviving partners, at the request of the executrix, executed a deed to the defendant, assigning to him all the partnership assets, and on the 12th of May, 1879, by another deed, the executrix assigned all her estate, right, title, interest, claim, and demand whatsoever, as executrix, in the estate of the firm to the defendant, upon trust, to collect and wind up the estate, and to distribute and pay over the net proceeds to the creditors in accordance with the provisions of the Insolvent Act of 1875, so as to insure the distribution of the assets amongst the creditors of the firm in accordance with the provisions of the Act.

Judgment.

This arrangement has been sanctioned and approved by a very large proportion of the creditors, both in number and value; but as a few disapprove, it becomes necessary to ascertain whether it can be sustained.

The execution of this deed of the 20th of March is the act of insolvency relied upon as the groundwork of the attachment, under the Insolvent Act of 1875, sec. 2, sub-sec. (j), as being an assignment for the benefit of creditors otherwise than in the manner provided by the Act. The attachment issued on the 12th of May. Such an assignment was held to be an act of bankruptcy without any special enactment: per Lord Eldon, in *Dutton v. Morrison* (a).

(a) 17 Ves. 193.

1880.

Davidson
v.
Papps.

It appears now that, according to what is likely to be realized from the estate, it was insolvent on the death of Mr. *Kerr*, on the 21st of November, 1878, but this has arisen, it is said, from the *shrinkage* in the value of the property. And in the statement prepared by the defendant in April, 1879, according to the then estimated value of the assets, there ought to have been a surplus of over \$30,000. And at the time of the execution of the assignment the surviving partners and the defendant thought the estate solvent.

I may notice that in the deed of March the only survivors granted the assets, the executrix not having then obtained probate covenanted to execute any further deed, and it was not till the deed of May that the executrix granted her estate; but as the executrix could not be made insolvent this is a matter of no importance, and the validity of the assignment must be determined as on the 20th of March.

Judgment. That the agreement between the survivors and the executrix was based on a good and valuable consideration there can be no question; she relieves them from any liability for the debts of the firm, and from any sum that might be found due from them on that account; and I think the effect of the whole transaction was a sale to Mrs. *Kerr*, the executrix, in consideration of the release. The assignment therefore is to be treated as the act of Mrs. *Kerr*; it was executed at her request to the defendant *Papps*, and should have the same effect and construction as if a simple transfer of the estate had been made to her and she had executed the deed to the defendant. And she not being liable to the insolvent law, the deed could not be treated as an act of insolvency.

It has been long held that a *bond fide* transfer of property from one partner to another on a dissolution, divests it of the character of partnership property and makes it the separate property of the transferee, so that joint creditors could not impeach it: *Ex parte*

Ruffin (a). In that case *Thomas Cooper*, the retiring partner, was solvent. Lord *Eldon* states the principle to be, that a *bonâ fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors; and therefore the Court always lets the arrangements be as they stand, not at the time of the commission, but of the act of bankruptcy. He goes on to say that *Thomas Cooper* certainly had no such equity as if the partnership had been dissolved by bankruptcy, death, effluxion of time, or any other circumstance not his own act. In that case the assignment was made before the bankruptcy; it was the surviving partner who became bankrupt. In the present case the partnership was dissolved by the death of Mr. *Kerr*, and the assignment is made afterwards by the surviving partners to his executrix. The equity the plaintiff is asserting is that of the surviving partners, which, it seems to me, they have as effectually precluded themselves from enforcing as if it had been made in the lifetime of Mr. *Kerr*.

1880.
Davidson
v.
Pappa.

Judgment.

In *Ex parte Walker* (a), an assignment was made upon a dissolution by one partner to another, in July, 1860; and in September, 1860, both severally became bankrupt within a few days of each other; but though the assignee became insolvent, differing from *Ex parte Ruffin* in this respect, it was held that the property had effectually become the separate property of the assignee.

I think the agreement here was made *bonâ fide*, indeed no evidence was given to question it, and that the assignment made in pursuance of it effectually transferred the estate. In the view I take of it, it could not be treated as an act of insolvency, for it is to be deemed the act of Mrs. *Kerr*, who could not be made an insolvent in regard to it.

Nor can the bill be sustained on the other ground,

(a) 6 Ves. 120.

(b) 4 D. F. & J. 509.

1880. *Davidson*
v.
Pappa. that as assignee of the survivors the plaintiff has the right to have an account of the distribution of the property. The assignment is not questioned on the ground of fraud, and the survivors have precluded themselves from any inquiry, as they acknowledge that they have no interest in the estate.

The bill must therefore be dismissed, with costs.

MEARNS V. THE CORPORATION OF THE TOWN OF PETROLIA.

Municipal Councillors—Three months' absence—Computation of time—Want of quorum—Injunction.

The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the Council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the Council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost; whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:

Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the Court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties; and that the injunction might be awarded upon an interlocutory application.

Settlement.

Motion for an injunction to restrain the council of the town of Petrolia, and the defendants, members of the council, from preventing the plaintiffs from discharging their official duties as members of the council, under the circumstances stated in the judgment.

Mr. *Moss* for the plaintiffs.

Mr. *Moncrieff* and Mr. *H. J. Scott*, contra.

PROUDFOOT, V.C.—I think the meeting on the 5th of April was a meeting of the council at which the plaintiffs attended. The minutes of the council shew that when the roll was called all the members were present. *Mearns*, one of the present plaintiffs, seconded a resolution moved by Mr. *Simmons*; and the Mayor says that upon this being defeated the plaintiffs, and *Simmons*, and four other councillors withdrew. The plaintiffs, in the exercise of their judgment as representatives of their constituents, thought it their duty to dissent from the proceedings of this meeting, and to withdraw from it. But upon the propriety of this course it is not my province to comment; it is sufficient that I should find they attended the meeting; the withdrawal at any stage of the proceedings did not the less make it a meeting.

1880.

Mearns
v.
Petroila.

Sept. 13th.

The council consists of fourteen members; and it requires a majority to form a quorum: R. S. O. ch. 171, sec. 226; and upon the withdrawal of the seven members the council could not act; any subsequent proceedings at that meeting were therefore irregular.

Judgment.

Laying aside the meeting of the 11th of May, which councillors, including the plaintiffs and those who adhered to them, attended as a meeting of health officers, under R. S. O. ch. 190, sec. 2, and which is perhaps open to the objection that it was not a meeting of council *qua* council, the next meeting summoned was that for the 31st May; this the dissentients did not attend.

Purporting to act under the R. S. O. ch. 174, sec. 170,—which, among other things, declares that seats of councillors become vacant for absenting themselves from the meetings of the council for three months without being authorized to do so by a resolution of the council, entered on its minutes,—at a meeting summoned for the 7th July, seven members of the council purported to pass a resolution declaring the seats of the seven dissentients vacant, and ordering a new election.

1880. When this resolution was moved the plaintiffs and some of those who adhered to them were present; and *Simmons* moved, seconded by *Mearns*, to refer the matter to the town solicitor. The amendment was declared lost; and *Mearns*, in his affidavit, says that thereupon, before the resolution was put or voted upon, the members who were opposed to it left the meeting, leaving only seven members present, and that when *Mearns* was leaving he drew the attention of the Mayor (*Kerr*) to the fact that there was no quorum. The Mayor, in his affidavit, admits having had his attention called to the want of a quorum; but says he was mistaken, as, including *Mearns*, there was a quorum. No doubt there was a quorum when *Mearns* spoke, but he was then leaving the room, the other six of his friends having preceded him, and the resolution was not passed till he had left. I think this resolution was not passed when a quorum of the council was present, and is inoperative; and that proceedings under it for a new election should be restrained.

Judgment.

But the three months' absence must be computed from the time the plaintiffs ceased to attend the meetings of council. They attended the meeting of the 5th of April. They did not attend that of the 31st of May; but there was no intermediate meeting that they ought to have attended but did not attend. It would be absurd to say that they absented themselves from meetings when there were no meetings at which to be present. The three months, therefore, should be computed from the 31st of May, and that time had not elapsed when the resolution of the 7th of July was carried. Whether a quorum was present or not it was equally beyond the power of the council to pass it. On this ground, also, I think the resolution inoperative.

It is objected that this Court has no jurisdiction to interfere, and that the plaintiffs must wait until a new

election is had, and then apply, either by *quo warranto* or by *mandamus*, to test the validity of the proceedings; or apply by *mandamus* now to compel the admission of the plaintiffs and their friends. There is no proceeding at law by which the contemplated election could be prevented; and I have no hesitation in determining this, independently of any increase of jurisdiction under the Administration of Justice Act, to be one of those instances in which a Court of Equity ought to exercise a restraining power: *Dillon* on Municipal Corporations, sec. 727.

The bill prays for a declaration that the plaintiffs' seats are not vacant, and that they are entitled to hold and exercise the office of councillors; and that the resolution declaring their seats vacant, and ordering an election, is improper and void. And that the defendants may be restrained from proceeding with an election to supply their places.

To that extent I think the plaintiffs entitled to what they ask.

The plaintiffs also pray that the defendants may be restrained from excluding the plaintiffs from the meetings of the council, and from preventing them from exercising the office of and acting as councillors.

It is said that this is the proper office of a writ of *mandamus*, and cannot be effected by an injunction from this Court. The operation of the two proceedings is practically the same. A *mandamus* is defined, or described, as an injunction at law, or a mandatory writ in a legal proceeding, commanding the performance of a specific affirmative act; an *injunction* belongs to a Court of Equity, and merely issues to prevent the doing of some specific act: *Dillon*, Mun. Corp. sec. 664. In the present case the *mandamus* would command the council to admit the plaintiffs to the performance of their duties; the *injunction* would restrain the council from preventing the plaintiffs from exercising their duties—the same purpose by a different mode

1880.

Moorns
v.
Petrolia.

Judgment.

1880.

Mearns
v.
Petrolia.

Judgment.

of expression. The same defences that would be available to an application for an injunction would be equally available to a *mandamus*; and the validity of these defences might ultimately be tried in the mode prescribed by the practice of the several Courts. The observations of *Taney*, Chief Justice of the Supreme Court of the United States (quoted in *Dillon*, Mun. Corp. sec. 663,) are as applicable to proceedings in our Courts between litigants as in the Courts of the United States. The Chief Justice says: "It is well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now considered as a prerogative writ. The right to the writ and the power to issue it have ceased to depend on any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It is a writ to which every one is entitled, where it is the appropriate process for asserting the right he claims": *Kentucky v. Dennison* (a). The provisions of the R. S. O. ch. 52, secs. 4-9, shew this to be the case, while sec. 10 shews that a *mandamus* may, in certain cases, be a prerogative writ. The Chancellor has recently held, in *Marsh v. Huron College* (b), that the Administration of Justice Act, sec. 86, (R. S. O. ch. 40, sec. 86,) confers upon this Court authority to entertain a suit for the enforcement of a right that would previously have been the peculiar function of a writ of *mandamus*. That was the case of a private corporation; but I see no objection, upon principle, to the extension of it to the case of a municipal corporation. If there were any special Court pointed out for the trial and determination of such questions, it would be otherwise. And were the office full, and recourse had to be had to a writ of *quo warranto*, it is quite probable that the only mode of procedure would be under R. S. O. ch. 174, secs. 179-200, before a Judge of a superior Court

(a) 24 How. 66, 97, 92.

(b) 27 Gr. 605.

of law, or a County Court Judge. But I find no such direction as to proceeding by *mandamus*. 1880.

At the hearing, therefore, the plaintiffs, it seems to me, would be entitled to the order they ask.

It remains to be considered whether they can have it on an interlocutory application. Several cases are quoted by Mr. Kerr in his work on injunctions, p. 53, in which mandatory injunctions have been granted on interlocutory applications. *Lane v. Newdigate* (a) was a case where the defendant was compelled to do several things on an interlocutory motion; and so in *Rankin v. Huskisson* (b). In *Readel v. Perry* (c), Sir John Stuart says: "Reference has been made to a supposed rule of the Court, that mandatory injunctions cannot properly be made, except at the hearing of the cause. I never heard of such a rule." In the present case were I to decline to grant the injunction it would practically be to deprive the plaintiffs of their office, as the case cannot be heard for some time, and the term of office expires at the new year. The right of the plaintiffs does not seem to me to be dubious, even upon the evidence given by the defendants; and I do not suppose the defendants can make a better case at the hearing than they have done upon their affidavits. Judgment.

I therefore consider it my duty to grant the injunction restraining the defendants from preventing the plaintiffs exercising their official duties.

Considering the dead-lock that seems to have occurred in this council, it may be doubtful whether the municipality or the plaintiffs will derive much benefit from the order. But I hope that wiser counsels, and the exercise of some mutual forbearance, may induce the representatives of Petrolia to unite harmoniously in carrying on the government of the town.

(a) 10 Ves. 192.

(c) L. R. 3 Eq. 465.

(b) 4 Sim. 13.

1880.

Mearns
v.
Petrolia.

I have not thought it necessary to consider whether absence, under sec. 170, *ipso facto*, avoids the seat, or whether it is not requisite to have a resolution of the council declaring it vacant, as I do not think the absence was established.

WILSON V. KYLE.

Mortgage—Assignment of subject to equities — Payments to mortgagee after assignment.

A mortgagor paid off a mortgage after the mortgagee had assigned it, and also a second mortgage obtained by fraud from the same mortgagor to the plaintiffs, who did not procure the mortgagor to join in the assignment of either, or notify him thereof;

Held, that the assignee took the mortgages subject to the equities between the original parties thereto; and as the original mortgagee could not, if plaintiff, have recovered upon the one mortgage because paid, nor upon the other, because invalid, so neither could his assignee.

Examination of witnesses and hearing at Goderich,

Mr. *Boyd*, Q. C., for the plaintiff.

Mr. *Attorney General Mowat*, for the defendants.

Feb. 18th. SPRAGGE, C.—From the evidence I take the facts to be these :

Judgment. The mortgage by *Kyle* to *McKinnon* was for \$400, and was dated 10th January, 1876, payable by two annual instalments, with interest, one 10th January, 1877, the other 10th January, 1878. The first instalment and interest was paid by *Kyle*; but before the second fell due, and on 26th March, 1877, *Kyle* being indebted to *Kelorne & Ryan* in \$191, *Moses*

Robison took upon him the payment of that debt, and agreed also to meet the second instalment of the *McKinnon* mortgage, which with interest was taken at \$214, and \$18 was taken as the expense of conveying and registration, and making in all \$423; and for that sum a mortgage of the above date was given on the same land by *Kyle* to *Robison*. *Kyle* was also indebted to one *Kidd* in \$160, and that debt also *Robison* agreed to pay for *Kyle*; and to secure him, a chattel mortgage for that amount of the same date was given to him by *Kyle*.

1880.

Wilson
v.
Kyle.

Robison paid *McKinnon*, and took from him an assignment of the mortgage dated 11th January, 1878, the day after it fell due. He made an assignment of it to *Beattie* 5th March, 1878, and *Beattie* assigned to the plaintiff, on 15th May of the same year. *Kyle* paid off the \$423 mortgage to *Robison*. This was after the assignment by *Robison* to *Beattie*. I have not the \$423 mortgage, and am not informed whether at the date of the assignment it was past due, and for the reason I will give presently it does not seem to me to be material whether it was so or not.

Judgment.

On the 28th September, 1877, *Robison* procured from *Kyle* a mortgage for \$168 on the same land. The procuring of this mortgage was a fraud on the part of *Robison*. *Robison* did not pay *Kidd*. The chattel mortgage was irregular; and *Kidd* sold the chattels in execution, and *Robison* after that procured the \$168 mortgage to be given by *Kyle* upon a representation made to *Kyle* and his wife that it was to replace a mortgage that was wrong. They seem to have had implicit confidence in *Robison*, and did not even ask for any explanation from his messenger, who does not appear himself to have been cognizant of the fraud. *Kyle* and his wife seem to have known that the chattels had been sold in execution, and assumed that there was something wrong in the mortgage for \$423, *Robison's* messenger saying—(so *Mrs. Kyle* swears, and

1880. I think truly)—that the mortgage which this was to replace was not so executed that it could be registered.

Wilson
v.
Kyle.

Robison committed the further fraud of assigning this mortgage of September to *Beattie* by assignment of the same date as the assignment of the *McKinnon* mortgage, and the two were assigned to the plaintiff of the same date, 15th May, 1878.

The plaintiff proceeds only of course upon the two mortgages assigned to him. It is clear that if these two mortgages were still in the hands of *Robison*, and he were plaintiff, that he could not recover upon either of them; not upon the *McKinnon* mortgage, for the payment of the \$423 to him reimbursed him for what he paid to *McKinnon* in satisfaction of that mortgag; and not upon the \$168 mortgage, for it was obtained from *Kyle* by fraud, and *Kyle* received no consideration for it. Is there then anything to prevent the application of the rule that the assignee of a mortgage takes it subject to the equities between the assignor and the mortgagor? In this case the rule may be applied in its more limited sense, *i. e.*, subject to the state of the accounts between the mortgagor *Kyle* and *Robison*; for as to one mortgage it was paid by the mortgagor, as to the other there never was a mortgage debt.

A doubt was raised in my mind by an argument of Mr. *Boyd* whether if the mortgage for \$423 were in arrear *Robison* might not innocently assign the *McKinnon* mortgage. But I think, upon reflection, that the large mortgage being in arrear, if it were so, could make no difference, for *Kyle* would properly pay *Robison*, unless he received notice from the assignee that the mortgage was in his hands, and *Kyle* does not appear to have had such notice till after he had paid off the \$423 mortgage.

The plaintiff complains now that *Kyle* was not so careful as he should have been in getting up his securities. I am not clear how this may be—the \$423

mortgage not having been put in; but the plaintiff has small reason to complain when both he and *Beattie* neglected the ordinary precautions, first of having the mortgagor a party to the assignments, and next of notifying the mortgagor of the assignments.

I attach but little importance to the language alleged by *Beattie* to have been used by *Kyle*, that it mattered not to him whom he paid. *Kyle* did not appear to be at all a man of business capacity, and seemed to possess rather less than average intelligence. Finding these two mortgages in the hands of an assignee, who probably told him, as the fact was (it is assumed to be so) that he was an assignee for value, he would assume that he had unfortunately to pay that assignee. It would in that case not be the admission of any fact, but an erroneous conclusion of law against himself, and of course not binding. In my opinion *Kyle* makes out his defence in regard to both mortgages. His own evidence, which was not given intelligently, and is somewhat confused, is corroborated in most points by other evidence, by that of *Strong*, by that of *Robert Robison*, and by that of his wife.

The plaintiff's bill is dismissed, with costs.

1880.

Wilson
v.
Kyle.

Judgment.

1880.

MERCHANTS' BANK V. SPARKES.

*Mortgage—Principal and sureties—Proceedings at law and in equity—
Complicated decree—Costs.*

A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties, by several bills upon their respective mortgages, and to sue at law in different actions the same parties, on notes held by the plaintiffs, to which the mortgages were collateral.

Held, that only one suit in equity was necessary, as all parties might have been brought before the Court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits; and the Court would not be deterred from granting relief by the circumstance of a decree being complicated.

The plaintiffs held certain paper of *Frederick Sparkes*, upon which *Robert Sparkes* and others were liable as sureties. The debt being overdue, an action was brought against the parties, and judgment recovered; separate mortgages were then given by the several parties on their respective properties to the plaintiffs in order to secure the debt, and the paper was renewed. The debt having again been allowed to run into default, the plaintiffs on the same day filed separate bills on all the mortgages for foreclosure, and also brought separate actions upon the paper against the several parties liable thereon. A consent decree was made, except as to the costs of the several bills, which the defendants contended were unnecessary, the whole rights being adjustable in one suit. They also contended that the actions at law were unnecessary, as complete relief could be given in a foreclosure suit under the present practice.

Mr. *Gormully*, for the plaintiffs.

Mr. *N. Sparkes*, for the defendant.

SPRAGGE, C.—In this case there were consent minutes between the parties, except as to costs at law and in this Court. 1880.

Merchants'
Bank
v.
Sparkes.

Feb. 18th.

There was one debt to the bank as to which *Frederick Sparkes* was principal debtor; *Robert Sparkes* and others were sureties, as parties to paper at the bank; and they severally mortgaged land, each by a separate mortgage his own land, by way of collateral security for the same debt. The debt being in default separate actions were brought at law against the several parties and separate bills in this Court filed against each for foreclosure or sale.

It is contended that separate actions at law were unnecessary at any rate; and I see no reason why all the parties liable could not be joined as defendants in one action. This indeed seems to have been done when an action was brought for the unreduced debt, and judgment recovered, as recited in the mortgage put in.

But it is contended further that the actions at law were unnecessary altogether. These actions were brought and the bills in this Court filed on the same day. A mortgagee can obtain in one suit in this Court, as well the old ordinary remedy of foreclosure or sale, as also all the remedies that he can obtain at common law. This was held as long ago as 1875, in *The Imperial Bank v. Boulton* (a); and it has been the constant practice since to make decrees in this Court giving all these remedies, and they are reached with as much celerity as the remedies at law. It follows that the actions at law were unnecessary. Judgment.

Further, it is contended that one suit in this Court would have sufficed against the principal debtor and all the sureties; and in this contention also I think the defendants are right. In *Campbell v. McKay* (b), Lord Cottenham, after referring to *The Attorney-Gen-*

(a) 22 Gr. 121.

(b) 1 M. & C. 623.

1880. *eral v. The Merchant Tailors' Co. (a)*, and *The Attorney-General v. The Goldsmiths' Co. (b)*, both cases of charitable trusts, says: "The result of the principles to be extracted from those two cases, negatives the proposition that where there is a common liability and a common interest, the common liability in defendants and the common interest in plaintiffs; different grounds of property cannot be united in one and the same record. On the contrary both those cases are consistent with the doctrine that they may be so united."

Merchants'
Bank
v.
Sparkes.

Judgment.

In the case of one surety for a mortgagor the rule is, not only that there may be one suit against both, and that independently of our general order, but that if any remedy is sought against the surety, he must be a party to the suit against the principal: *Stokes v. Clendon (c)*. I apprehend that no serious difficulty would be found in framing a decree where there are two or more sureties. If none redeem all are foreclosed. If the principal redeem all are entitled to a reconveyance or vesting order. If one surety redeem the conveyance or vesting order would be to that one, and the mortgagee would be out of the case; and the rights of the defendants would be worked out amongst themselves by petition in the case or otherwise, unless that contingency were provided for by the decree; and the same would be the case if the mortgage debt were paid in part by one surety and in part by another, or realized in part by receipt of rents and profits or otherwise. It is not necessary to settle now the mode in which this should be done; or whether the contingencies that might arise should be provided for in the decree, or on further directions, or by the parties having liberty to apply. As there are consent minutes and the only question before me is one of costs, all that I have to determine now is whether more than

(a) 5 Sim. 288.

(b) 1 M. & K. 189.

(c) 3 Swan. 150. n.

one suit is necessary, I am satisfied, that in some mode, all the rights of the parties can be adjusted in one suit. The Court is not deterred by the circumstance of a decree being complicated, or having to provide for several contingencies. An instance of this is the decree made in *Aldworth v. Robinson* (a), which is set out in the appendix to Mr. Fisher's Book on Mortgages (b). There is also a form in *Seton on Decrees* (c) where, as in this case, there were separate mortgages by the principal and the surety. The form was settled by Sir John Leach, as appears by what was said by the Vice-Chancellor in *Beckett v. Micklethwaite* (d). The rule in the ordinary case of decree against principal mortgagor and surety is thus stated by Mr. Fisher:—
 "Where one person has mortgaged his estate as a surety for another the decree is so framed as to give the surety the full benefit of his rights, against the estate of the principal debtor. And the right of redemption being given to both, it is ordered that if the money be paid by the principal debtor, the estate shall be conveyed to the respective owners; but if by the surety, both estates are conveyed to him, and he of course holds that which belonged to his principal, subject to redemption by him. If neither principal nor surety redeem, the equities of both their estates are foreclosed."

1880.
 Merchants'
 Bank
 v.
 Sparkes.

Judgment.

I incline to think there would be not only very much, less expense, but also less difficulty in working out the rights of all parties in one suit than in several.

The plaintiff is to pay to the defendants the costs of the argument before me, unless those costs are among the matters the subject of consent minutes.

(a) 2 Beav. 287.

(c) 4th ed., p. 1114.

(b) p. 1055.

(d) 6 Mad. 199.

1880.

TYRWHITT V. DEWSON.

Will, construction of—Legacy on termination of life estate.

By his will and codicil a testator devised to his son *J.* on the death of his mother, certain land in consideration for which he was to pay the sum of £150 to the executors in four years. In the event of his dying without heirs the land was to be sold and the amount received therefor over and above £150 "to be equally divided amongst my surviving children."

Held, (1) that *J.* took a fee-tail in remainder after an implied life-estate in favour of the mother, as the "dying without heirs" must be taken to mean heirs of the body, not heirs general, he having brothers and sisters still living :

J. died during the lifetime of his mother.

Held, (2) that the period of division should be the death of the tenant for life, and the survivors at the time of such death were to take the whole amount realized by the sale of the lands upon which, however, the £150 was to form a charge.

Motion for decree for the construction of the will of the late *Jeremiah Dewson*.

Mr. Bain and *Mr. Scanlan*, for the plaintiffs.

Mr. Moss and *Mr. Black*, for the defendants.

The points in question are stated in the judgment of

Judgment. PROUDFOOT, V. C.—By his will and codicil the testator devised to his son *Julius*, on the death of his mother, the north-half of lot number one, in the fourth concession of West Gwillimbury, in consideration of which he was to pay, in four years, to the executors £150. In case of his death without heirs, or if not heard of for four years, the lot was to be sold, and the amount over and above the £150 "to be equally divided amongst my surviving children."

Death without heirs here means death without heirs of the body, as *Julius* could not die without heirs general while his brothers or sisters were alive, and

therefore the heirs will be restricted to heirs of the body. 1880.
The rule applies to real as well as personal estate. Tyrwhitt
v.
Dewson.
Julius, therefore, took a fee-tail in remainder, after an
implied life-estate in his mother: *Hawkins*, 177; 1
Jarm. 498.

The principal difficulty arises as to the children
entitled to the proceeds of the sale, *Julius* having
died in the lifetime of his mother. There are three
classes of claimants; those who survived the testator;
those who survived *Julius*, and those only who sur-
vived the tenant for life.

It is now well settled, after great fluctuation of
opinion, that if a legacy be given, after a life-estate, to
two or more equally to be divided between them, or
to the survivors or survivor of them, there the period
of division is the death of the tenant for life, and the
survivors at such death will take the whole of the
legacy: *Cripps v. Wolcott* (a),—a rule applied to
realty by other cases: *Gregson's Trusts* (b), *Murphy*
v. Murphy (c). Judgment

There will be a declaration accordingly; and that
the £150 forms a charge on the proceeds of the sale.
Costs of all parties out of the estate.

(a) 4 Mad. 11.

(b) 2 D. J. & S. 428.

(c) 20 Gr. 575, 577.

1880.

THE INTERNATIONAL BRIDGE COMPANY V. THE CANADA
SOUTHERN RAILWAY COMPANY, AND THE CANADA
SOUTHERN RAILWAY COMPANY V. THE INTER-
NATIONAL BRIDGE COMPANY.

*Bridge company—Tolls—American charter—Canadian charter—
Unconstitutional legislation.*

Under the legislation of the State of New York, which gave a special power to impose tolls, and of Canada incorporating the original International Bridge Company, and permitting them to consolidate, the amalgamated company had power to levy tolls; and in Canada they were unrestricted in their powers of levying.

Held, also that as between a claim for tolls already earned and a rate to be fixed for the future, it was properly within legislative authority to limit future tolls, but it was a judicial function to determine a reasonable sum, considering all the circumstances, to be paid for tolls already earned.

Held, also that such charters are in the nature of contracts between the public and the undertakers of the scheme, and the latter should not be restricted in their right to compensate themselves after having embarked private capital in them.

Semble, that in the absence of express authority in the Canadian Acts to impose tolls there is an implied power to do so as incident to their undertaking.

The directors of the Bridge Company had framed a schedule of tolls, with knowledge of which the defendants used the bridge, kept an account as to the amount charged them by the plaintiffs, and compounded with the plaintiffs for arrears on the same basis:

Held, sufficient to charge them as upon an agreement to pay the schedule tolls; and that the defendants could not set up that the tolls were unreasonable.

The Act of Congress passed after the amalgamation declaring the bridge a lawful structure and a post road of the United States of America, and that the District Court of New York should settle terms and conditions upon which lines of railway should use the bridge, could not and did not take away the right to impose tolls at discretion expressly given to the American company by the New York charter, and it could not and was not intended to affect Canadian subjects or the Canadian corporation. The Parliament of Canada could not constitutionally, and did not enact that Canadian subjects and the Canadian corporation should be subject to the legislation of Congress: Hence the amalgamated company by virtue of their Canadian charter had unrestricted power to impose tolls and recover them in Canadian Courts; or at any rate the

Canadian company could do this for their half of the bridge, making such arrangements as should be necessary with the American company as to the other half. 1880.

It would be unconstitutional for the Parliament of Canada to pass an Act, rendering Canadian subjects and Canadian corporations subject to such laws as might be passed by the Congress of the United States; in fact an abdication of sovereignty inconsistent with the relations of Canada to the Empire of which it forms a part.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

In the first mentioned suit a bill had been filed, on the 2nd of January 1879, by *The International Bridge Co.* against *The Canada Southern Railway Co.* stating in effect the incorporation of the plaintiffs by an Act of the Legislature of the State of New York for the construction of a bridge across the Niagara river, from Buffalo to some point near Fort Erie, for the purpose of allowing the passage of railway trains across the said bridge; * also the passage of a similar Act in Canada for the like purpose, and also subsequent Acts by the respective Legislatures empowering the said companies to amalgamate, which they subsequently did. That by the first Act of the State of New York above mentioned, "power was conferred upon the said company to charge and collect such rates and tolls for the passage of the said bridge by any railway company or trains as might be determined upon by the directors of the said company;" and in pursuance thereof the said company duly fixed the rates and tolls to be so paid, namely: for every loaded car, \$1 each; every empty car, 50c.; every baggage and express car, \$1.10; every passenger, 10c.; every excursionist, 5c.; every locomotive \$7.50; and every caboose, 50c. That the defendants, in 1874, entered into an agreement with the plaintiffs for the use of the said bridge, and thereby agreed to pay to the plaintiffs the rates and tolls so fixed by them, and that the defendants had used the said bridge from the 31st day of October, 1877, down to the 31st day of December, 1878, and that the tolls payable by the

Statement.

* As to this, see *Attorney General v. The Bridge Co.*, ante page 65.

1880.
International
Bridge Co.
v.
Canada
Southern
R. W. Co.

defendants to the plaintiffs up to the last named date amounted to \$227,554 of which the defendants had paid \$70,332, leaving due the plaintiffs up to that date \$157,222.

The bill further alleged that the defendants had failed and neglected to apply their revenues and earnings towards the payment of their working expenses, and the claim of the plaintiffs, as provided by the Act of 41 Vict., ch. 27, D., but were applying the same for other purposes not authorized by the said Act, and unless the Court interfered and appointed a receiver the defendants would continue to misapply their said earnings and revenues: and prayed that "the defendants may be ordered forthwith to pay your complainants the sum of \$157,222, and interest; that a receiver be appointed to collect and receive the revenues and earnings of the said defendants, and apply the same in payment of your complainants' claim; that all necessary directions may be given and accounts taken," and for other and further relief.

Statement

The defendants answered the bill alleging, amongst other things, that they had never been able to agree with the plaintiffs, or *The Grand Trunk R. W. Co.*, (which latter company, it was alleged had, acting under the provisions of certain Acts of the Dominion, acquired a lease of the said bridge in perpetuity,) upon the amount of compensation with which the defendants should be chargeable for the user thereof and its approaches, and had only been able to arrive by a compromise with the two companies at an adjustment of the amount to be paid for such user up to the 31st of October, 1877, being \$58,000, which the defendants had fully paid long before the filing of the present bill. The answer further alleged that neither the plaintiffs nor the *Grand Trunk R. W. Co.* had ever "lawfully by any by-laws, rule, or regulation or otherwise fixed the rates of tolls to be paid by any railway company for using the said bridge, nor did the defendants by

any agreement binding upon it or executed under its corporate seal, or otherwise legally valid or binding on it, ever agree to pay such rates or tolls as the said *Bridge Company* or the *Grand Trunk R. W. Co.* of Canada, as its lessee, should demand for the user of the said bridge, or any other rates or tolls"; and the defendants used such bridge, as they had the lawful right to do, subject only to such compensation as could be legally claimed; and such compensation was to be determined without any undue discrimination in favour of the *Grand Trunk R. W. Co.*, or any other railway company, and should be reasonable in amount. The answer further set forth certain claims made by the plaintiffs on the defendants, which together with the sums payable by the *Great Western R. W. Co.* and *The Grand Trunk R. W. Co.* would, after deducting the amount properly payable for expenses in operating and repairing the said bridge, leave a net annual revenue or income of at least \$220,000 for the user of such bridge; that the rates charged for the then current year were unreasonable in amount and an unjust charge upon the traffic passing over said bridge, not warranted by the cost of the structure and expense of working the same, and such as would unduly discriminate against the defendants and in favour of *The Grand Trunk* and other railway companies, and could not therefore be lawfully demanded of the defendants; and the answer objected that the *Grand Trunk R. W. Co.* was a necessary party and should have been joined as a party defendant to the said bill.

The defendants, *The Canada Southern R. W. Co.*, also filed a bill against the *Bridge Company* and *The Grand Trunk R. W. Co.*, to which the *Attorney General* of Ontario was also made a party, seeking substantially the same relief as claimed by the answer in this suit; and the two causes came on for hearing together at the sittings of the Court at Toronto in the autumn of 1879.

1880.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

Statement.

1880.

Inter-
national
Bridge Co.
v.
Canada
Southern
R.W. Co.

The other facts of the case and the points relied on by counsel appear sufficiently in the judgment.

Mr. *Blake*, Q.C., and Mr. *W. Cassels*, for the plaintiffs.
Mr. *Crooks*, Q.C., and Mr. *Kingsmill*, for the defendants.

Judgment.

PROUDFOOT, V.C.—A corporation was created by the Legislature of the State of New York in 1857, 17th April, with power to associate with any corporation in Canada (sec. 1), for the construction and maintenance of a bridge across the Niagara river from the city of Buffalo to some point near Fort Erie, in Canada, so as not materially to impede the navigation of the river (sec. 16), for the passage of ordinary teams and carriages, and (sec. 17) for the passage of railroad trains, with power to make by-laws, rules, and regulations, not inconsistent with the provisions of that Act, in relation to the use of the bridge, &c., by railroad companies, their trains and carriages, and the compensation or tolls, (sec. 18,) to be paid therefor, as the directors might think proper, but no discrimination was to be made in favour of or against any one or more railroad companies, either as regards the use of the bridge or the compensation therefor.

A few months later in the same year the Parliament of Canada, by an Act, (20 Vic. ch. 227,) which received the Royal assent on the 27th August 1857, created a corporation for a similar purpose, with power to unite with any company chartered by the people of the State of New York. The directors were empowered (sec. 9) to conduct, manage, and oversee, and transact all the concerns and affairs of the corporation and all matters and things whatever in any wise relating to the same. And (by sec. 16) the company were authorized to make by-laws, rules, and regulations in relation to the use of the bridge, its machinery, appurtenances, and approaches by railway companies, their trains and car-

riages, as the directors might think proper, but no discrimination was to be made in favour of or against any railway company. 1880.

This Act does not contain in express terms the power in the New York Act to impose compensation, or tolls, for the use of the bridge. But such a power must arise by necessary implication from the purpose for which the corporation was called into existence, from the authority given to the directors to manage, conduct, and transact all the concerns of the corporation, and from the authority to pass by-laws in relation to the use of the bridge. Certainly it was part of the affairs of the corporation to obtain a remuneration for the expense of making and maintaining a structure of so costly and exceptional a character as this; and a by-law in relation to the use of the bridge, &c., must have been intended to embrace compensation for the use. There is not a word in the Act to lead to the conclusion that the company were engaging gratuitously in the enterprise.

Judgment.

But all doubt upon the subject is removed by a subsequent Act (32 & 33 Vic. ch. 65, D., 22nd June, 1869), which extended the time for building the bridge, and sanctioned a union with a company incorporated by the State of New York for a similar purpose, and gave authority to amalgamate and consolidate its stock with such other company by an agreement to be submitted to the stockholders; and (by sec. 7) enacted that upon the perfecting the agreement, &c., the corporations, parties to it, should be deemed and taken to be consolidated and to form one company, and should possess all the rights, powers, privileges, and franchises, and be subject to all the disabilities and duties of each of such corporations so consolidated and united.

A similar Act was passed by the Legislature of the State of New York on the 4th May, 1869, the 6th section of which is to the same purport as the 7th section of the Canada Act.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

1880.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

If the New York company had the power to impose tolls for the use of the bridge under their original charter, that power is expressly conferred upon the united company.

I consider it then to be clearly established, whatever the effect may be, that, under the legislation both of New York and Canada, the amalgamated company had express power and authority to impose and levy tolls for the use of the bridge.

Neither the Acts of New York, nor of Canada, contain any limitation of the amount of tolls that may be imposed, but leave it in the discretion of the directors. It was strenuously contended that notwithstanding such a power the tolls must be reasonable, a term that was not clearly defined, but was intended to limit the bridge company in the dividends it might derive from the undertaking to what some Court might think reasonable. The magnitude of the undertaking, and its forming a link in the line of transit of the products of the great west to the seaboard, and the enormous bulk of traffic expected to be carried by the railways centring there, were enlarged upon as giving a public or national character to the work, so that it must be looked upon as constructed for the use and benefit of the people of the two countries, and that a bare remuneration for expenditure, or at most a small and moderate profit, was all that should be allowed to the company.

Judgment.

All such undertakings are supposed to benefit the public, but they are not the property of the public, so as to entitle the public to say that they must be worked for their benefit, and not for that of the stockholders. This enterprise has been undertaken by private individuals, providing their own money, and running the risk of not being able to construct and complete the work. No public money was spent upon it. And it would seem more in accordance with the principles of political economy, that the capital of the

state should have been expended in building the bridge, if it was intended that the citizens should derive the benefit of the tolls, than for the state to encourage the investment of private capital, and then, when the venture turns out successful, to step in and take the benefit of it. Similar things have been done, but they have usually been characterized by opprobrious names, and it can scarcely be expected that they should receive much countenance in a Court of Justice.

1880.
Inter-
national
Bridge Co.
v.
Canada
Southern
R.W. Co.

No doubt the respective governments, when granting franchises to these corporations, might have enforced such terms as they thought proper, and if the charters were accepted with these conditions they must be observed—if too onerous terms were imposed, the charters would not have been accepted. When no conditions or limitations as to toll were inserted in the charters, it was probably because no body of men could be found to hazard their fortunes in an endeavour to bridge the Niagara, if any other limitations were imposed than those that would result from a sense of their own interest.

The magnitude and hazard of the undertaking were described with great clearness by Col. Gzowski, one of the contractors, in his evidence, and have been detailed by him in a book of singular interest, not only to engineers, but to general readers. The project was scouted as chimerical by many engineers of great eminence, and the contractors were advised not to involve their fortunes in an enterprise that must certainly fail. It was only by the exercise of the highest engineering skill, the lavish expenditure of money, and a firmness and resolution that were proof to every trial, that the difficulties were overcome.

These same difficulties would have to be met, and to be overcome, were an attempt made to build a rival bridge; and thus it is said, that, though the practicability of the design has been established, the present Company has a position of vantage, and could obstruct

1880.
Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

Judgment.

the maturing and perfecting any scheme of the kind, and has thus a practical monopoly of the transit. There would be a good deal of force in this argument, if this were the only route the produce of the west could follow in its way to the seaboard. But it is not so. There are railways on the south shore of Lake Erie running from Detroit to Buffalo, which if not quite so short as those in Canada, are not much longer, and with not much difference in running time; and there is another bridge across the Niagara, at no great distance from this; and were the Bridge Company to impose an unreasonable toll the traffic would readily find an outlet by the other lines. The company has thus the strongest inducement not to fix too high a toll. The public of the Western States are but slightly interested in the matter, for their produce can pass over either route, and the notion of the Bridge Company having it in their power to inflict an injury of a grave character on this traffic is vain and illusory. These considerations are sufficient to account for neither New York nor Canada imposing a limit on the amount of tolls. Self-interest, the most cogent of mercantile motives, would do it for them.

In the absence of any legislative limit, no authority was cited to shew that the common law of either country required that tolls to be levied on a structure of this kind, built in the manner that has been mentioned, must be reasonable, *i. e.*, must be such as a Judge, or a jury, would deem reasonable. Both in England and the United States, a power to make by-laws or ordinances is implied in every corporation, where it is necessary for the accomplishment of the objects of the incorporation, and these must not be at variance with the general laws of the realm, and must be reasonable and adapted to the purposes of the corporation: *Dillon* on Municipal Corporations, 253; *Grant* on Corporations, 76. And where there is a general grant of a right to take

market tolls, not specifying the amount, the tolls must be reasonable: *Grant*, 166, 167. But no such limitation has ever been imposed upon a power such as in this case, to charge such compensation as the directors might think proper. The Acts of the Legislature may be well considered as in the nature of a private bargain between the undertakers and the public, and when the enterprise has been begun and completed upon the faith of the bargain, the undertakers are entitled to insist upon the terms being strictly complied with.

In *Chicago, &c., Railroad Company v. Iowa* (a), Waite, C.J., says: "It is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the constitution of the United States, which prohibits a State from passing any law impairing the obligation of a contract."

It may be doubted whether even at common law the rule as to reasonableness applied in the case of a *toll thorough*, such as this is, where the company is bound to keep the bridge in repair: (See *Lawrence v. Hitch*, Judgment. (b), and cases cited in the argument.)

The bridge company completed the bridge, which was open for traffic on the 3rd November, 1873, and a schedule of tolls was fixed (1st November 1873,) by the directors, which is still in force. Modifications have, from time to time, been made by the bridge company, not in the rate of tolls, but in the shape of deductions to be made according to the traffic of the companies using it. Thus, on the 15th December, 1874, it was resolved that whenever any railway company should execute and deliver to the bridge company a guaranty satisfactory to the vice-president that its tolls would amount to at least \$55,000 per annum for at least one year from the date of the guaranty, then the bridge company would accept from the railway company tolls at one-half the rate of the tolls then charged

1880.
Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

(a) 4 Otto 161.

(b) L. R. 3 Q. B. 521.

1880. under the tariff, during the period covered by the guaranty; provided however, that tolls at the rate of \$1057.69 per week, were to be paid in any event. The effect of this would be, that 50 per cent. of the tolls above \$55,000 per annum, would be deducted. It was ratified at a subsequent meeting of the stockholders, held on the 18th October, 1876, and on that day at a meeting of the directors it was stated that the *Canada Southern Railway Company* had complained that the tolls charged on traffic passed across the bridge were too high, and the vice-president was requested to negotiate with the parties using the bridge, in regard to the proposed revision of the tariff of tolls, and make such alterations therein as might appear desirable, subject to the approval of the board.

As on the 31st October, 1877, the arrears of tolls due by the *Canada Southern Railway Company* were found to be \$73,944.75, and the bridge company agreed to accept \$58,000 in satisfaction, which has been paid.

Judgment.

Subsequent to October, 1877, there was a good deal of correspondence between the officers of the bridge company and the railway company, the latter claiming that under the charters only a *reasonable* toll could be imposed, and that the true way of determining the amount, was to make an account each year of the following items:—Interest upon cost, cost for renewals and repairs, and cost to operate; and then have the three roads make up their returns of traffic carried over the bridge, and this divided into the sum total of cost to the bridge company, would fix the basis upon which each road should contribute: and while making these claims and suggestions, asking for time to pay the sum that was clearly due, from "the road being in a sort of transition state." The bridge company reply, stating that an agreement had been made by the *Canada Southern Railway Company* in respect of the tolls, and saying that the contention that the *Canada Southern Railway Company* should be practically made part

owners in the bridge company could hardly be seriously put forward: that they advanced no capital, incurred no risk, and were not liable for maintenance: that the railway company had misconstrued the charters; and, at all events, the bridge company would not acquiesce in the mode proposed for fixing the tolls.

1880.
Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co

I find no evidence in writing of any agreement by the *Canada Southern Railway Company* in regard to the amount of tolls to be paid, though there seems to have been an understanding in some way that they were to be on the same footing as the Great Western Railway, the terms of which are contained in a letter of Mr. Brydges of 22nd January 1875.

There is no dispute among the parties as to the amount owing by the railway company if the bridge company are at liberty to make the charges they have done.

I have decided that, so far as the Statutes of New York and Canada are concerned, the bridge company had power to impose such tolls as they pleased. The bridge company fixed a schedule of tolls. The railway company knew this, used the bridge for their traffic, kept an account in their books of the tolls charged by the bridge company at the rates specified in the schedule, and compounded for arrears calculated on that basis, all of which, it appears to me, is sufficient to charge them as upon an agreement to pay the scheduled tolls. Besides, Mr. Taylor, the assistant treasurer of the *Canada Southern Railway Company*, prepared an account and sent it to the *Grand Trunk Railway Company*, shewing the position of his company in relation to the bridge company down to 13th April, 1878, which is calculated on the basis of the tariff, with the subsequent modification as to rebates. There is not a word of objection to the tariff.

No doubt for a considerable time the railway company were complaining of the rates as too high, but these complaints were not acquiesced in, the right of

1880.
 {
 Inter-
 national
 Bridge Co.
 v.
 Canada
 Southern
 R. W. Co.

the bridge company to impose the tolls was insisted upon, and while the amount was modified from time to time by way of rebate, that was not done from any doubt of the right to impose the tolls, but dictated by considerations as to its effect on the traffic over the bridge. For Mr. *Brydges* significantly hints in regard to his proposal as to a maximum amount for annual tolls, that if such an arrangement were not made the *Great Western Railway* would take care to confine the amount of their business so that it would never exceed the \$55,000 a year.

If the defendants' contention is correct that the tolls ought to be reasonable, the evidence does not seem to me to establish that they are other than reasonable. The items to be covered by tolls, as stated in Mr. *Tillinghast's* letter produced at the hearing, do not include any allowance for profit to the shareholders on their investment, and make no provision for a sinking fund. Both are matters that ought to be provided for. Judgment. The latter is one of peculiar importance from the constant danger of accident, which would involve a very heavy outlay to remedy. Much of the evidence given by the defendants was for the purpose of showing the cost of operating the bridge and its maintenance to be much less than alleged by the plaintiffs. From the view I take of the law of the case I have not thought it necessary to investigate this very closely, but the impression I received from the evidence was that the plaintiffs had not charged too much. The witnesses called for the defendants were gentlemen of respectability and of eminence in their profession as engineers, but the *data* furnished by the defendants, upon which they made their calculations were defective.

But the principal reliance of the defendants for their contention that the tolls must be reasonable, rests upon the Act of Congress, approved on the 30th of June, 1870. The company applied for an Act of Congress, but not for the clause now relied upon,

which was inserted during its progress through the house. It was desired to get the sanction of Congress to the bridge to prevent any action by the Federal Government to declare the bridge a nuisance, as interfering with navigation. The defendants also contend that the agreement to amalgamate the two companies had reference to this Act of Congress, and intended to embody its provisions. But the agreement was executed on the 18th May, 1870, six weeks before the Act of Congress was approved, and it will require a very special reference to embody a future Act into an agreement. The only clause relating to the matter is the 22nd, which says: "That the several clauses of the several Statutes of the State of New York and of the United States of America, and also of the late Province of Canada, and of the Dominion of Canada, relating to the said companies, parties hereto, or either of them, to the extent in the last two of the Acts in the recital to this agreement mentioned, except in so far as other provision is made in this agreement, shall apply to the said new company so consolidated as aforesaid, and said new company shall have, exercise, and enjoy all the powers and rights held by the said two companies before the completion of said consolidation and amalgamation." The two Acts recited are the New York Act of 1869, and the Canadian Act of the same year. These, of course, could not import into them legislation by Congress, which was not asked for, and was not in fact made, till the following year. And both these Acts contemplated the new company having, and gave to them, the right to enjoy all the powers of the separate companies, which included the right to impose tolls at discretion. There is not a word in the agreement relating to future legislation, and it could not be supposed the parties to it intended to embody an Act of Congress that would, according to the present contention, nullify an express term of that very agreement.

1880.

Inter-
national
Bridge Co.
v.
Canada
Southern
R.W. Co.

Judgment.

1880.
Inter-
national
Bridge Co.
v.
Canada
Southern
R.W. Co.

Judgment.

The Act of Congress itself, by its first section, declares that any bridge across the Niagara river, constructed under the New York Acts, shall be a lawful structure, and is authorized to be made and maintained as provided by these Acts; and declares it to be a post road for the mails of the United States; but the Act was not to be construed as authorizing the construction of a bridge which should not permit the free navigation of the river to substantially the same extent as would be enjoyed under the New York Acts. This section seems to recognize the jurisdiction of the New York Legislature to grant powers to construct the bridge, provided it did not interfere with navigation, and by declaring the bridge lawful precluded the chance of its being declared a nuisance or interfered with by the Federal Government. It contains no reference to the Canadian company, nor to the amalgamation of the companies, and it does not profess to extend any of its provisions beyond the boundary line. The second section, which is chiefly relied on, is in these words: "That the bridge herein named shall be subject, in its construction, to the supervision of the Secretary of War of the United States, to whom the plans and specifications relative to its construction shall be submitted for approval. And all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the District Court of the United States for the Northern District of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree."

If this Act of Congress is to be construed as putting the amount of tolls under the jurisdiction of the District Court, difficulties would arise that appear to me insuperable through the ordinary machinery of the Courts of either country. Both the New York and

the Canadian Statutes sanction an amalgamation, so that the power to impose tolls at discretion might be exercised by the consolidated company. If the Act of Congress limits this power as to the New York company, then the amalgamation may probably have failed to take effect. Again, the Act of Congress only can apply to the New York Company, and it does so in express terms; how can its arm be stretched so as to reach to this side of the boundary? and if it did it would be powerless. There are, besides, many objections of great importance, under the Federal constitution, to the exercise by Congress of the power claimed. Upon this subject I must be guided by the evidence of experts: *The Attorney-General v. The Niagara Falls International Bridge Co.* (a). The only evidence at the hearing on this matter was that of Mr. Sprague, an able and intelligent counsellor from Buffalo. He states: "That the right of Congress is entirely derived from the right to regulate commerce and establish post roads. The power to regulate commerce is very extensive. Congress assumes ultimate jurisdiction over navigable streams between States, and between the United States and foreign countries. But the States have a right to build bridges, so as not to obstruct navigation. Congress would have the power to say that a bridge formed an obstruction. Congress never created but one corporation, the United States Bank, and the Act has been since repealed. * * Congress could not assume any regulation of commerce in a foreign country. The Judge of the District Court, under this Act, is authorized to adjudicate upon equality of rights by various companies as between them and the bridge company, but not to fix tolls, or deprive the company of that right. * * The Legislatures of New York and Canada, having vested in the bridge company the right to determine compensation for the

1880.
International
Bridge Co.
Canada
Southern
R.W. Co.

Judgment

(a) 20 Grant 490.

1880.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

use of the bridge, it would not be a proper construction to say t' at Congress meant to take it away. Congress only meant to determine contests under the charter. In any other view constitutional objections might arise. Congress has no power to deprive any person of his property unless by due course of law; a power to impose tolls is property, and to take it from the company would infringe the rule. Due process of law means process of the Courts, not Legislative action."

Again, "Congress cannot delegate legislative powers. Assuming that Congress had power to fix tolls, it is a legislative power, and could not be delegated to a Court."

Judgment.

The petition filed by the railway company in the United States District Court prays the Court to determine and prescribe the terms and conditions upon which the petitioners may use the bridge, &c., including the compensation to be paid for the same and the mode of adjusting it, and also including the amount claimed by the bridge company to be due for the year ending 31st October, 1878. It thus seeks from the Court not only a decision of what would be a reasonable compensation for the past use, but also to determine such compensation for the future. The Act of Congress says not'ing about the reasonableness of the terms and conditions. It does not enact that the bridge company are to be entitled to any compensation, this is all left, it is said, in the discretion of the Judge. Chief Justice *Waite*, in giving the judgment of the Court in *Munn v. Illinois* (a) says: "In countries where the common law prevails it has been customary from time immemorial for the Legislature * * to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But

(a) 4 Otto 113, at 133.

this is because the Legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the Court must determine what is reasonable. The controlling fact is the power to regulate at all." The determination of what would be a reasonable compensation to be charged in the future and for all time to come would appear to be a legislative function: to ascertain the amount for the past, a judicial function. If Congress had said that the bridge company should be entitled to reasonable tolls, and referred it to a Court to prepare a scale, the right would depend upon the legislative Act, and the judicial function would properly be exercised in carrying out the duty imposed on the Court. There would be a limit that the Court could not exceed. For a *reasonable* sum is specific and certain. It is like the *arbitrium boni viri* of the Civil Law. The right of the subject would not be uncertain, would not depend upon the uncontrolled discretion of the Court or Judge. But there is no such enactment to be found in this Act of Congress. When it is said that where there is no legislative action on the subject the Courts must determine what is reasonable, that must plainly refer to the services rendered, or user enjoyed, in the past, and is equally certain and fixed as if it had been expressly included in a legislative Act.

I have referred to this decision because it maintains the legislative power on such subjects to an extent more nearly like that enjoyed by our own Parliament than some of the other cases cited; but it was not a unanimous decision, and two of the ablest Judges of the Court, *Field* and *Strong*, JJ., dissented, because it was an unconstitutional interference with the rights of owners of property to fix what compensation they pleased for its use.

The doubt as to the legislative power, however,

1880.
Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

Judgment.

1880. gives force to the argument that Congress did not mean, by implication, or by uncertain and ambiguous phraseology, to interfere with an authority clearly and unambiguously conferred upon the bridge company by the Legislatures of New York and of Canada.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

I do not mean to enter upon the discussion of these constitutional questions, which involve matters upon which the best judicial minds in the United States have been frequently engaged, and which have given rise to very great conflict of opinion. Any one who reads *Pomeroy's* work on Constitutional Law (a), will readily see how hopeless a task it would be for a foreigner to endeavour to steer his course among the decisions, not always uniform, of the Supreme Court of the United States.

I am satisfied to rest upon the construction of the Act given by Mr. *Sprague*, and which seems to me to be amply justified by a perusal of the Act itself—that it was not intended to fix the amount of tolls at all, but to provide for equality among the companies using the bridge, and at all events was not intended to interfere between Canadian subjects and Canadian corporations. Again *terms and conditions* do not necessarily refer to tolls. They may mean to regulate the hours of passage, the order in which the companies are to be entitled to pass, the use of the approaches &c.; and as we must assume the Congress to have been aware that the company, by the New York Acts, which are referred to in the Act of Congress, were entitled to impose tolls at discretion, and there is no statement of an intention to deprive them of that power, the fair presumption is that *terms and conditions* did not include tolls, or if they did it was only for the purpose of maintaining equality, not to fix the amount.

I refer, however, to a case in the Supreme Court of the United States, *Peik v. Chicago and North Western R. W. Co.* (b), from which a principle may be

Judgment.

(a) Secs. 323-384.

(b) 4 Otto 164.

deduced sufficient for the decision of this case; and in the application of it, there will be no need to construe the Act of Congress; and it is a principle that preserves intact the right of national sovereignty.

In that case a railway corporation had been created in Illinois, which was afterwards consolidated with another in Wisconsin. For the purpose of promoting this consolidation, the Legislature of Wisconsin passed an enabling act, providing that the Consolidated Company should be and remain subject to the laws of the State of Wisconsin and the State of Illinois respectively, and should have in all respects the same privileges as though the consolidation had not taken place, provided that the laws of Illinois should have no force and effect in the State of Wisconsin. In effect Wisconsin said, you may consolidate your interest with the other company, and form one corporation in the two states, but in so doing you must in Wisconsin be subject to our laws. The Consolidated Company was bound, under the land grant to the Wisconsin Company, to keep that part of its road which formerly belonged to that company open as a public highway for the use of the Government of the United States, free from toll &c., and to transport the mails at such prices as Congress might direct. The United States did not complain, and the Court said it would be time enough to consider an objection on the ground that the regulations interfered with this right of the United States, when the United States made complaint. As to the effect of the statute as a regulation of inter-state commerce, the Court said, "The law is confined to state commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state Commerce, it is certainly within the power of Wisconsin to regulate its fares, &c., so far as they are of domestic concern. Certainly until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within

1880.

International
Bridge Co.
v.
Canada
Southern
R. W. Co.

Statement.

1880. even though it may indirectly affect those without."

Inter-
national
Bridge Co.
v.
Canada
Southern
R.W. Co.

Now if the corporation consolidated by the statutes of Illinois and Wisconsin was to be governed by the laws of the State in which the controversy arose, so long as the United States did not interfere and assert their paramount sovereignty, much more must that be the case where the United States *cannot* interfere. Neither New York nor Canada has introduced the laws of one country into the territory of the other. If Canada has chosen to pass an Act in terms similar to the New York Act, it derives its validity from the Canadian Legislature, not from the Legislature that originally created it. No express clause was required to exclude the laws of one from operating in the territory of the other; the exclusion arose from the countries forming part of different nationalities with different sovereign powers. Each country has assented to the corporation created by it uniting with the corporation created by the other, and bringing into the union the rights and liabilities conferred or imposed upon it. And certainly Canada has not introduced the provisions of any Act of Congress, nor consented to any Act of Congress passed subsequent to the union applying to the united company. Were the Canadian Parliament to endeavour to do so—to say that Canadian subjects, and Canadian Corporations were to be subject to legislation, that might be passed by Congress, it would, I apprehend be unconstitutional, it would be authorizing a foreign power to legislate for its subjects; an abdication of sovereignty inconsistent with its relation to the Empire, of which it forms a part.

Judgment.

The united company are entitled to say, in conformity with the rule in the case cited, that by virtue of their Canadian Charter they are at liberty to impose tolls upon Canadian Companies, owing their existence to Canadian legislation, having their franchises, their property, and their domicile in Canada; and to sue for these tolls in Canadian Courts. It would probably be

found impossible to sue foreign corporations here, or the judgment might be fruitless, but in that case the company would take care not to run accounts with them, and would require payment for each train as it passed the bridge.

Or if we assume that the Act of Congress has imposed an effectual curb on the New York Company, then either the union has not been perfected, as in violation of the authority given to unite, or it has been perfected with a limitation operative on the New York Company. In the former case there does not seem anything to prevent the Canadian Company from imposing the tolls for the use of one-half of the bridge, and arranging with the New York Company that the passage of the other half should be free, or in the latter case for the united company to say, that they did the same by virtue of their Canadian charter.

To solve effectually the difficulties raised by the contention of the defendants, and to qualify and restrict the powers of the bridge company in the way they wish, would require something more than the legislative provisions that have been made.

The defendants seemed to feel the force of the objection, that limiting the power to impose tolls was obnoxious to the constitutional provision, against depriving a person of his property without compensation. And their counsel contended, that *terms and conditions* included a power to allot compensation to the bridge company, for the impairment of its franchise. But I think they do not. The disputes to be decided by the District Court are only those that arise between the railway companies themselves, or between them and the bridge company, as to the use of the bridge. Not a word as to compensation for the diminution of the franchise, and, if that were to be implied, the measure of it would just be the amount by which the tolls were diminished, so that practically the parties would be in the same position, as if the original power remained.

1880.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

Judgment.

1880.
Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

After the hearing of this cause, the petition of the *Canada Southern Railway* to the District Court came on to be heard; when a preliminary application was made by the bridge company, to dismiss it for want of jurisdiction. No evidence was given, and no order was drawn up. The learned Judge refused the application. I do not apprehend that the matter thereby became *res judicata*. It was not a final decision, and the Judge at the hearing might change his view. In fact Mr. *Laning* says that the Judge declined to put it in the shape of an order, as it would all come up at the final decision of the case. I have been favoured with a copy of the judgment of the learned Judge, upon this application; and if it were his final and concluded opinion, I would pay every deference to it as the decision of one more familiar with American Statutes and law than I am. But his view is still in suspense, and may be altered at the hearing, upon further argument. So far as he reasons upon the constitutional aspect of the question, it does not affect the conclusion I have come to; but I do not agree in the construction he places upon the Act of Congress, for the reasons already given. Congress does not profess to deal with the amalgamated company, nor the Canadian Company; its jurisdiction only extended to the boundary line; and if it has effectually imposed a restraint on the American Company, the amalgamation has not been perfected; but it would be contrary to reasonable rules of construction to infer that the act contemplated something which would render its operation nugatory, unless there were clear and express terms to that effect.

Judgment.

Another objection to the plaintiffs' recovery was that the stock of the bridge company was all owned by the *Grand Trunk Railway*, except two shares; that the directors of the railway company were the directors of the bridge company, and that this suit is really brought for the benefit of the *Grand Trunk Railway*.

The Canadian Act, 20 Vict. ch. 227, sec. 15, authorized any railway corporation having a terminus at the Village of Waterloo, (Fort Erie), or the City of Buffalo to subscribe to, or become the owner of the stock of the bridge company, in like manner and with like rights as individuals. The *Grand Trunk Railway* coming within that description, might legally become stockholders; and there is no limit to the number of shares they might hold; they might therefore own the whole, and by continuing the organization of the bridge company, as they have done, may enjoy and exercise its franchise. This seems not to need argument. And by the amalgamation acts the united company is to possess all the privileges of the previous separate companies. There is no allegation, or at all events no proof, that the *Grand Trunk Railway* enjoy any preference in passing the bridge. It is possible that shareholders in the bridge company might, under certain circumstances, have cause to complain of the conduct of the directors, and might seek redress in the Courts, but no such case has arisen; and the *Canada Southern Railway*, who are not shareholders in the bridge company, can be in no position to say that the directors are responsible to them for the management of the bridge company.

1880.
International
Bridge Co.
v.
Canada
Southern
R. W. Co.

Judgment.

It was also objected that the *Grand Trunk Railway* were in the position of lessees of the bridge. If that were the case they might be necessary parties to the suit, and the record could be amended accordingly. But it is denied that such a relation exists, and I do not find that it is established.

I think, therefore, that the plaintiffs are entitled to a decree, with costs. If the parties are agreed upon the amount, the Registrar will insert it in the decree, if not, there will be a reference to the Master to take the account on the basis of the scheduled tolls, with the modifications by way of rebate which the bridge company have agreed to make.

1880. The case of *The Canada Southern R. W. Co. v. The Bridge Co., The Grand Trunk R. W. Co., and The Attorney-General of Ontario*, depends upon the decision in the former case, and it was agreed that the evidence taken in it should be used in both.

Inter-
national
Bridge Co.
v.
Canada
Southern
R. W. Co.

Judgment. The bill of *The Canada Southern R. W. Co.* is based on the proposition that the bridge company are only entitled to a reasonable remuneration for the use of the bridge, and charges (sec. 21) that they have never been able to come to an agreement as to the amount of compensation to be paid for such use. And (sec. 22) that neither the bridge company nor the *Grand Trunk R. W.* have ever lawfully, by any by-law or regulation, or otherwise fixed the rate of tolls to be paid by any railway company using the bridge, nor had they any lawful power to do so, nor did the *Canada Southern R. W. Co.* by any agreement binding upon it, or executed under its corporate seal, agree to pay such tolls as the bridge company demand; and (sec. 23) that the *Canada Southern Railway*, used the bridge as they had the right to do under the statutes in that behalf, subject only to such compensation for such user as could or can be legally claimed, to be determined without undue discrimination in favour of any railway company, and should be reasonable in amount; and (sec. 28) that the tolls claimed are unreasonable: that (sec. 31) the bridge company threaten to close the bridge to the railway: that (sec. 32) the District Court named in the Act of Congress is a competent and proper tribunal for determining the terms and conditions, and that application had been made to it to fix the compensation; and (sec. 33) that *The Canada Southern Railway Company* is also entitled to the benefit of the jurisdiction of this Court, especially to have their right to the use of the bridge declared, and to be protected against any interference therewith.

As I have come to the conclusion that the bridge company are not restricted in their power to levy

tolls; that if they are, the tolls charged are not unreasonable; that the *Grand Trunk Railway Company* are not lessees of the bridge; that the bridge company have lawfully fixed the tolls; that the District Court named in the Act of Congress has no jurisdiction to fix the tolls; and that this railway company ought not to be protected in the use of the bridge without paying the tolls fixed by the bridge company; and that by the use of the bridge under the schedule of tolls the railway company must be deemed to have agreed to pay them, I think the bill of the railway company must be dismissed, with costs.

1880.

International
Bridge Co.
v.
Canada
Southern
R. W. Co.

1880.

BARTLETT V. JULL.

Mortgage—Power of sale—Insufficiency of notice—Infant heir.

A power of sale in a mortgage required notice upon default to be given to the mortgagor, "his heirs, executors, or administrators," or left for him or them at his or their last or usual place of abode, before exercising the power.

Held, that a notice which was served upon the widow, who was also the administratrix of the deceased mortgagor, and addressed to her as such widow, was insufficient, because not served also upon the heir-at-law of the mortgagor, although only an infant about three years of age; and that the sale under the power was therefore void.

The notice stated only that unless payment was made proceedings would be instituted to obtain possession.

Held, also, that on this ground the notice was insufficient to support a sale.

In proceeding to impeach a conveyance executed in pursuance of such a sale the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the *onus* of impeaching it is not upon the party alleging the invalidity of the deed.

Examination of witnesses and hearing at Brantford, in the spring of 1879.

The facts of the case are sufficiently stated in the judgment.

Argument.

Mr. *Boyd*, Q. C., for the plaintiff.

Mr. *Moss*, for the defendants, on the opening of the case, contended that the *onus* of impeaching the validity of the sale and the conveyance in pursuance thereof was upon the plaintiff.

Mr. *Boyd*, Q. C. The defendants here claim under a deed made under a power of sale contained in the mortgage, and as they derive title under the purchaser at the sale thereunder they should shew that the terms of the power have been strictly complied with.

[SPRAGGE, C.—I think that as the defendants claim under the purchaser at the sale, the *onus* is upon them to prove a due exercise of the power.]

The cases cited appear in the judgment.

SPRAGGE, C.—The mortgage, for default in payment of which the land in question in this case was sold, under power of sale contained therein, was made to secure payment of £62 5s., and was from *Daniel Bartlett* as devisee of his father *John Bartlett*, to *James Jull*. Its date is the 8th of January, 1855.

1880.
Bartlett
v.
Jull.

The power of sale is peculiar. It enables the mortgagee, three months after notice demanding payment to sell, without more; differing in that respect from the extended form given in our statutory short form of mortgages, in which the notice informs the mortgagor of the mortgagee's intentions in that behalf.

March 12th.

In the mortgage in question the notice after default is to be given to the mortgagor, "his heirs, executors, or administrators," or "left for him or them at his or their last or most usual place of abode in this Province." There is a covenant by the mortgagee, that without such notice there shall be no sale or lease, or any means taken for obtaining possession.

The mortgagor died, and on the 27th of February, 1860, notice was given by *Philip Seaton*, as assignee of *James Jull* the mortgagee, demanding payment of £33 6s. 2d., as due upon the mortgage, and concluding thus: "and unless paid to me within three calendar months from the service hereof, I will institute legal proceedings to gain possession of the premises mentioned in said mortgage." The notice is addressed, "To *Nancy Bartlett*, widow of *Daniel Bartlett*, late of the township of Windham, deceased, and *William Winskill* and *James Jull*, of the same place, executors of the last will and testament of *John Bartlett*, late of the said township of Windham, yeoman, deceased." The notice to the executors of *John Bartlett* was a notice to parties who had nothing to do with the matter. At the date of the notice *Nancy Bartlett* was administratrix of *Daniel*, and the plaintiff, his only child, was then about three years of age.

Judgment.

The notice required by the power was, as I read it,

1880.

Bartlett
v.
Jull.

to be given to or left at the abode of the mortgagor, if living; or in the event that happened, his death, to be given to or left at the abode of his heirs and his executors or administrators, and if left, left "for them." There is no disjunctive, and what is required would not be satisfied without notice being given to or left for and at the place of abode of both the heir and the personal representative. This is the natural and ordinary meaning of the words; and it is because they are so, and because of the difficulty that arises in giving such notice, that in Mr. *Prideaux's* book on Conveyancing, vol. i., p. 434, the introduction of the words, "or some or one of them," is recommended.

Judgment.

There was no notice given to the infant, and the next question is, whether the infant being so young as he was would excuse the not giving it. In *Tracey v. Lawrence* (a), it was held that notice under power of sale was properly given to an infant heiress. The age of the infant is not stated. The power required that notice should be given to the mortgagor, his heirs or assigns. In *Woods v. Hyde* (b), notice to an infant heir of an election to purchase was held valid, and that the notice constituted a contract. There was also a notice given to the guardian of the infant, but it was the notice to the infant that was held proper and sufficient. In *Robertson v. Lockie* (c), there was a partnership, which either party was, by the terms of the articles, to be at liberty to dissolve by giving six months' notice to the other. One of them became insane, and the other served him with notice of dissolution. The question was, whether the partnership was dissolved from the expiration of the notice, or the date of the decree. It was held that the notice was effectual. The Vice-Chancellor, while observing that it did not follow, because the defendant was insane, that

(a) 2 Drew. 403.

(c) 15 Sim. 285.

(b) 10 W. R. 339.

he did not know that the notice was a notice to dissolve the partnership, added: "If he had been perfectly deaf and blind the notice would have been effectual."

I find no case in which it has been held, or in which it has been contended, that where, by the terms of a contract, notice is required to be given, notice will be dispensed with because the person to whom it is to be given is not of capacity to understand it.

It does not follow, from the heir in this case being so young, that the placing of a proper notice in his hands, directed to him as heir-at-law, would necessarily have been an idle form. It might have drawn the attention of the child's mother, who was, I apprehend, his guardian in socage, to his rights, and to her duties in that relation; but whether practically useful or not it was a something, without the doing of which the mortgagee had not the power to sell.

It cannot be said that the notice, addressed as it was to "*Nancy Bartlett*, widow of *Daniel Bartlett*," was a notice to her as mother and guardian in socage of the infant. It may have been intended, and may have been taken to be a notice to her as administratrix, or as dowress. It was not a notice given to, or left for the heir, as required by the terms of the power.

Judgment.

Further, there is this objection to the sale, in connection with the notice. Upon notice and demand, if regularly given, the mortgagee could, without more have proceeded to sell. Without such notice he could not only not sell, but he could not take any means for obtaining possession, he was debarred by his covenant from doing so. He states in his notice what he will do in case of default, viz., that he "will institute legal proceedings to gain possession." He notifies the widow that he will do one thing, and then proceeds to do another thing essentially different. I incline to think that the infant may object to the sale on this ground also. The heir has only recently come of age.

My conclusion upon these grounds is, that the sale cannot be sustained.

1880.

Bartlett
v.
Jull.

1880.

Bartlett
v.
Jull.

There are some suspicious circumstances in the case in relation to the assignment of the mortgage from *James Jull* to *Seaton*, and the sale from *Seaton* to *James Jull*; and whether *Jull* was not guilty of some practices to obtain the place for himself at an under-value; but I am not prepared to say that the evidence went further than to raise suspicion. I place my decision on the ground of the want of notice.

Mr. *Prideaux*, at the page I have mentioned, thus speaks as to the provisions that the power of sale should contain: "It is important to provide that a purchaser under the power shall not be bound or concerned to inquire whether default has been made, or the required notice given, and that he shall not be affected by any irregularity in the sale. For want of such a provision a mortgagee is often unable to force the property on a purchaser, while on the other hand the purchaser, however willing, may be prevented from acquiring a satisfactory title by reason of the difficulty of obtaining affirmative proof that the circumstances on which the valid exercise of the power depends have arisen. Where a proper stipulation to the effect above suggested is inserted, it is clear that a purchaser need make no inquiry." * * *

Judgment.

The bill is to redeem, and asks for an account of rents and profits. The defendants, on the other hand, claim that large improvements have been made, in the belief that the sale was valid; and that in the event of the plaintiff being allowed to redeem, they should be allowed for them. What each asks is reasonable and proper.

The plaintiff is entitled to his costs, occasioned by the defendants resisting redemption. The other costs, up to decree, will be as in an ordinary redemption suit. Subsequent costs, and further directions, will be reserved.

The land was devised by *John* to *Daniel*, subject to the support of *Philander*, a person of weak intellect. It may be that *Jull*, in letting to tenants, obtained less

rent for it on that account, if the tenants took upon them the support of *Philander*. *Jull* will only be charged with what he received, and a reduced rent on that account in good faith will be that with which he will be properly chargeable. If, on the other hand, he himself supported *Philander*, he should only be charged with such rent as would be paid by a tenant taking the place subject to his support. It will be for the Master to say to what extent, if at all, the charge for rents and profits should be diminished by the land being charged with the support of *Philander*, and in taking the account the Master will have regard to the fact of labour and services rendered by *Philander* to *Jull* or to his tenants.

1880.

Bartlett
v.
Jull.

Judgment.

1880.

WOOD V. HURL.

Construction of Statutes—Grouping clauses in Acts—Findings—R. S. O. cap. 49, ss. 10 & 11.

Held, following *Eastern Counties &c. R. Co. v. Marriage*, 9 H. L. Ca. 32; *Lang v. Kerr*, L. R. 3 App. Ca. 529, and *Van Norman v. Grant*, ante vol. xxvii. p. 498, that both sections 10 and 11 R. S. O. cap. 49, are to be governed by the heading immediately preceding section 10; so that where the interest sought to be reached by the creditor has not been concealed by a fraudulent conveyance, the Judge has no authority to give summary relief under sec. 11; and a decree for partition issued by a local Master at the instance of a purchaser at Sheriff's sale, under an order made by a County Court Judge, where the interest which had been sold was that of one of four tenants in common in an equity of redemption in land which was subject to two mortgages in different hands, was on appeal reversed, with costs.

Cronn v. Chamberlain, ante volume xxvii. p. 551, as to the invalidity of such sale followed; *Donovan v. Bacon*, ante vol. xvi. p. 472 n. doubted.

Statement. *Samuel Hurl* was one of four tenants in common of certain real estate incumbered by two mortgages in different hands.

There being a County Court execution against him, the Judge of the County Court, Peterborough, made an order under sect. 11, R. S. O., ch. 49, for sale, under the execution, of his interest in the lands. The plaintiff purchased at the sale held under this order, and, upon proceedings taken under recent general orders, obtained from the Master at Peterborough a decree for partition against the defendants, who were *Samuel Hurl's* co-tenants in common, and who thereupon appealed.

Mr. *Boyd*, Q.C., for the appeal, contended that sec. 11 was not intended to cover the case of any equitable interest in lands except such as was previously saleable at law, unless such interest is brought within sect. 10 by a fraudulent conveyance of it. This is shewn by the heading to this group of clauses in the statute and by the collated sections. He referred to *Donovan*

v. Bacon (a), *Wood v. Wood* (b), *Samis v. Ireland* (c), 1880.
Eastern Counties &c., R. W. Co. v. Marriage (d), *Lang*
v. Kerr (e).

Wood
 v.
 Hurl.

Mr. Shepley, contra. The heading to these clauses was not in the original statute before revision and is of no more force than the marginal notes, which by express provision are no part of the statute. *Wood v. Wood* and *Donovan v. Bacon* are disapproved of by the Court of Appeal in *Samis v. Ireland*, and the sale may be upheld under sec. 35 or sect. 39, ch. 66, R. S. O. An analogy is afforded by *Allan v. Edinburgh Life Assurance Co.* (f). See also *Heward v. Wolfenden* (g), *Van-Norman v. McCarthy* (h), *Re Keenan* (i), *McDonald v. Reynolds* (j), *Rathbun v. Culbertson* (k). But even if the sale cannot be supported under the *fi. fa.*, the debtor's interest was clearly one which could have been made available in equity, and therefore the Judge's order was within, sec. 11, and the sale under it vests the debtor's interest in the plaintiff, who purchased at the sale, and who is therefore entitled to maintain partition: *Hatton v. Haywood* (l).

PROUDFOOT, V. C.—The 10th and 11th sections of the R. S. O. ch. 49, are ranged under the heading of Jan. 20th, (1881.)
 "Summary Inquiries into Fraudulent Conveyances."

The effect of arranging clauses in statutes under such general headings was considered in *The Eastern Counties &c., R. W. Co. v. Marriage* (m). Two sections of the lands clauses consolidation Act 1845, viz: the 93rd and 94th had to be construed. They followed a head line which stated, "And with respect to small portions of intersected Judgment.

(a) 16 Gr. 472.

(c) 4 App. R. 118.

(e) L. R. 3 App. Ca. 529.

(g) 14 Gr. 188.

(i) 3 Chy. Cham. 285.

(k) 22 Gr. 465.

(m) 9 H. L. C., 32.

(b) 16 Gr. 471.

(d) 9 H. L. C. 32.

(f) 19 Gr. 238, 25 Gr. 306, 26 Gr. 192.

(h) 20 C. P. 42.

(j) 14 Gr. 691.

(l) L. R. 9 Chy. 229.

1880.

Wood
v.
Hurl.

lands be it enacted as follows": The sec. 93, "If any lands not being situate in a town &c." The sec. 94, begins, "If any such land shall be so cut through and divided," &c. And it was decided that the word such in the sec. 94, referred to the general heading, and not to sec. 93. *Channell, B.*, says: "These various headings are not to be treated as if they were marginal notes or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to to explain its enactments, but as affording, as it appears to me, a better key to the construction of the sections which follow, than might be afforded by a mere preamble." And *Bramwell, B.*, is very decided in his opinion that "This general heading is not only in good sense, but as matter of verbal accuracy to be considered as governing, and to be read before each section which ranges under it, as though they had been numbered 1, 2, and so on."

Judgment.

Similar effect was given to the headings in a Glasgow Police Act, in *Lang v. Kerr (a)*. And I understand that in *Grant v. VanNorman*, our Court of Appeal has decided that the R. S. O., ch. 50, sec. 200, giving an appeal from any order, &c., of a County Court Judge is confined by the heading preceding sec. 189, to orders made in regard to determination of matters of mere account by reference to referees or arbitrators.

Following these cases I must hold that both sec. 10 and 11 of R. S. O., ch. 49, are to be governed by the heading, and that where the interest sought to be reached by the creditor has not been covered up or concealed by a fraudulent conveyance, the Judge had no authority to give relief in the summary mode there authorised.

(a) L. R., 3 App. Ca. 529.

There were two mortgages on the property sold under the execution held in different hands, and under the authority of *Donovan v. Bacon* (a), and other cases of that class, the statute authorising the sale of equities of redemption did not apply. These cases have been questioned in our Court of Appeal in *Samis v. Ireland* (b), but not overruled, as it was held that in fact no sale had taken place in that case. And if the case before me had turned upon that question, I would have felt much perplexity as to the proper course to pursue, as it seems probable, when the occasion arises, that the Court of Appeal will not hesitate to overrule *Donovan v. Bacon*. But the execution under which the sale took place here was against one of four tenants in common, and in *Cronn v. Chamberlin* (c), this Court has held such a sale to be invalid. The appeal must therefore be allowed, with costs.

1880.

Wood
v.
Hurl.

Judgment.

(b) 16 Gr. 472.

(c) 27 Gr. 551.

(b) 4 App. 118.

1880.

BELL V. LEE.

Will, invalidity of—Testamentary capacity—Undue influence—Insane delusion—Inoperative will—Costs.

The testator's habits of intemperance were such that his wife and children were compelled to abandon his residence about twelve or thirteen years before he died, after which his health became completely undermined by his indulgence in strong drink. About three weeks before his death, and while confined to bed, from weakness and general debility, acting on the suggestions of persons about him, he obtained through the intervention of his brother-in-law, whose children took a valuable interest under his will, the services of a solicitor, who took instructions from him and prepared his will in accordance therewith, which will was executed by him in presence of such solicitor and another witness. By his will he deprived his own family of the greater portion of his property, devising it to the children of his brother-in-law. Medical evidence was adduced, tending to shew that from the long continued habit of drinking in which the testator had indulged, his mind was in such a state as to render him unfit to make a will; on the other hand, a medical practitioner, who was attending him at and subsequent to the time the will was executed, swore he was competent to do so, and the professional gentleman who prepared the will was also of that opinion. The Court [SPRAGGE, C.] on a balance of the evidence, decided in favour of the testamentary capacity, apart from the insane delusion hereinafter mentioned; but it was clearly established that the testator, after such separation between himself and his family had continued for about nine years, became possessed of the idea that his youngest child, a daughter, was not his; and although there did not exist any ground for such suspicion, his friends were unable to change his convictions in this respect, and in consequence thereof he refused to make, and did not make any provision for such child by his will. The Court considering this an insane delusion, held, that in consequence the will became wholly inoperative—not inoperative in part only, that is, as regards the daughter for whom no provision had been made; and dismissed a bill filed to establish the will, with costs to be paid by the parties seeking that relief; not out of the testator's estate.

The bill in this case was filed by *Charles Thomas Bell*,
Statement. and *Rachel Lee* and *Florence Lee*, the last two being
infants under the age of twenty-one years, by *Thomas
Hawkins Lee*, their father and next friend, against

Walter Sutherland Lee, Catherine Fanny Bell, Laura Augusta Bell, William Clayton Bell, Edith Alexandra Bell, and Clara Victoria Fanny Bell, the last three being infants under the age of twenty-one years, and *Elizabeth Bywater*, setting forth that one *Thomas Bell*, who departed this life in 1867, duly made and published his will, dated the 25th of July, 1855, whereby he left certain properties to his two sons *William Houghton Bell* and *Charles Thomas Bell*, the one being appointed trustee for the other, and the two sons trustees for their sister; and the several *cestuis que trust*, the two sons and daughter, were by the said will empowered to devise their respective shares, provided the devise was to his or her own child or children, or his or her brother or sister, or their child or children.

The bill further stated that by an Act, 32 Vict. ch. 79, O., all the estate real and personal of the testator was vested in *William Thomas Mason*, in trust for the benefit of the said sons and daughter, and that such trustee having become incapable of acting in the said trusts, one *John McBean*, in pursuance of the Act, had been appointed in his place, and *McBean* having died, the defendant *Walter Sutherland Lee* was, pursuant to said Act, substituted in place of the said *McBean*; and that no division of the said estate into three parts as directed by said will had been made.

The bill further set forth that on the 30th of October, 1879, the said *William Houghton Bell* duly made and published his last will and testament in, amongst others, the words following:

1st. As to the disposal of my remains, some kind friend will see that they be deposited in the plot of ground in the Necropolis where my relations are usually buried.

2nd. As to all my estate which I received from, and under the will of my late father, I devise and bequeath the same to my brother, *Charles Thomas Bell*, in trust, to pay one-fourth of the annual income arising from such estate, in quarterly payments, to my daughter *Edith*, during his lifetime, and upon my brother's death, my will is, that one-quarter of my said estate be paid to my said daughter, and as to the residue of the income from my said estate, I desire my said brother to pay, first, my indebtedness to the estate of my late father, and to release my Policy of Life Assurance from such indebtedness,

1880.

Bell
v.
Lee.

Statement.

1880.

Bell
v.
Lee.

and after payment of such indebtedness, I bequeath the remaining three-fourths part of the income of my said estate to my said brother for his own use during the period of his natural life, and in the event of his dying—leaving lawful issue—I bequeath and devise three-fourth parts of my estate to and among such issue, share and share alike, to be divided upon the youngest attaining the age of twenty-one years; and in the event of my said brother dying without lawful issue, I devise and bequeath the said three-fourths part of my estate to *Rachel* and *Florence Lee*, the children of my sister, share and share alike, to be divided when the youngest attains the age of twenty-one years. I give and bequeath to *Elizabeth Bywater* the Policy of Assurance upon my life for three thousand dollars, and all moneys arising therefrom. I nominate, constitute, and appoint *Walter Sutherland Lee*, of the City of Toronto, Esq., the executor of this my will, and direct that he do receive the income from the said estate, and pay the same to the beforementioned trusts of this my will. I also direct that the division of the estate of my father, contemplated by him, do not take place, except with the consent of two out of the three representatives of the parties entitled thereunder.

And on the 5th day of November, 1879, the said *William Houghton Bell* duly made and published a codicil to the said will, in the words and figures following, that is to say :

“I, *William Houghton Bell*, of the City of Toronto, in the county of York, Esquire, do make, publish, and declare this to be a codicil to my last will and testament, made on the thirtieth day of October, A.D., 1879.

Statement.

I bequeath to my daughter *Laura Augusta* from the annual income arising from my share in the estate of my late father, the sum of two hundred dollars annually, in quarterly payments, during the lifetime of my brother *Charles Thomas Bell*, and at the death of my said brother, I bequeath to my said daughter *Laura Augusta* the sum of three thousand dollars, to be paid out of my said estate, and I direct that the devise to my said brother, and the other devises and bequests in my said will, be subject to the provisions of this codicil, and, except as above, I confirm my said will.”

The bill further stated that *William Houghton Bell* departed this life on or about the 19th day of November, 1879, without having in anywise altered or revoked the said will, save as the same is altered by the said codicil, leaving, him surviving, his widow, the defendant *Catherine Fanny Bell*, and four children, the defendants *Laura Augusta Bell*, *William Clayton Bell*, *Edith Alexandra Bell*, and *Clara Victoria Fanny Bell*; and that the *Walter Sutherland Lee* named as the executor of the said will is the defendant of that name, who is now trustee of the estate of the before named *Thomas Bell*, as hereinbefore set forth : that the

plaintiff *Charles Thomas Bell* had not any living issue born to him, and the plaintiffs, *Rachel Lee* and *Florence Lee*, are the children of *Emily Ann Lee*, the sister of the said *William Houghton Bell*, named in his said will, and are entitled under his said will in default of issue of the said plaintiff *Charles Thomas Bell*; and the defendant *Elizabeth Bywater* is the person named in the said will of the said *William Houghton Bell*; and submitted that, under and by virtue of the said will of the said *William Houghton Bell* and the codicil thereto, the plaintiff *Charles Thomas Bell* became and was entitled to receive, during his lifetime, one-third of the income of the estate of the said *Thomas Bell*, to be dealt with by him as by the said will and codicil is directed, and that upon the decease of the said *Charles Thomas Bell* without lawful issue, the other plaintiffs would become entitled to a portion of the said one-third, subject to the provisions of the said will and codicil.

1880.
Bell
v.
Lee.

The bill further alleged that the defendants, *Catherine Fanny Bell*, *Laura Augusta Bell*, *William Clayton Bell*, *Edith Alexandra Bell*, and *Clara Victoria Fanny Bell*, pretended and insisted that the said will and codicil were not duly executed, and were not the last will and testament of the said *William Houghton Bell*, and that he had died intestate; and that they had notified the defendant *Walter Sutherland Lee* as trustee of the estate of the said *Thomas Bell*, not to pay over to the plaintiff *Charles Thomas Bell* any part of the income of the said last mentioned estate, as directed by the said will and codicil; and, in consequence of such notification, the said last named defendant *Walter Sutherland Lee* would not pay over to the said plaintiff *Charles Thomas Bell* the income directed by the said will and codicil to be paid to him; and that the defendants *Edith Alexandra Bell* and *Laura Augusta Bell* declined to accept the benefits conferred upon them by the said will, and joined with their

Statement.

1880. *Bell v. Lee.* mother and sister and brother in insisting upon the intestacy of the said *William Houghton Bell*: that the said *William Houghton Bell* was possessed of no other estate, save that derived under the will of the said *Thomas Bell*, except the policy of insurance mentioned in the said will; and also that the defendants *Catherine Fanny Bell*, *Laura Augusta Bell*, *William Clayton Bell*, *Edith Alexandra Bell*, and *Clara Victoria Fanny Bell*, had recently commenced a proceeding in the Surrogate Court of the County of York, to compel the defendant *Walter Sutherland Lee* to apply for probate of the said will and codicil, in order to enable the other defendants last named to raise the question of the validity of the said will and codicil; but the defendant *Walter Sutherland Lee* was not desirous of contesting the said question, and he was not beneficially interested in doing so, and the plaintiffs had not been made parties to the said proceedings.

The prayer of the bill was—

Statement.

“(1.) That it may be declared that the said will and codicil were and are duly executed, and that they together constitute the last will and testament of the said *William Houghton Bell*; and that the said will and codicil may be established by this Court, as against all persons interested or claiming in opposition thereto; (2) that the defendants *Catherine Fanny Bell*, *Laura Augusta Bell*, *William Clayton Bell*, *Edith Alexandra Bell*, and *Clara Victoria Fanny Bell*, may be restrained from further preventing the defendant *Walter Sutherland Lee* from paying over to the plaintiff *Charles Thomas Bell* the income of the said share of the said *William Houghton Bell* in the estate of the said *Thomas Bell*, and from further prosecuting in the said Surrogate Court the proceedings commenced therein by them; (3) that the rights and interests of all parties interested under the said will and codicil, or otherwise, in the said share of the said *William Houghton Bell* may be declared by this Court.” And for further and other relief.

The defendants *Catherine Fanny Bell* and *Laura Augusta Bell* answered, setting up, amongst other defences, that under the will of *Thomas Bell*, *William Houghton Bell* had no power to devise the estate, or any portion of the estate he derived under the said will, to any person or persons other than his own child or children, and that therefore in any event, to the extent of such estate, the alleged will

1880.

Bell
v.
Lee.

of the said *William Houghton Bell*, in the said bill referred to, was void; and that prior to and at the date of the alleged will therein referred to, they and the remainder of the children of the said *William Houghton Bell* were not living with him, and had for some years been living away from him, because of his habits; and that for many years prior to, and up and to and at the date of the said alleged will, the said *William Houghton Bell* had been and was addicted to the immoderate use of intoxicating liquors, and was all or nearly all of such time under the influence of intoxicating liquors, and was unable to attend to his business or affairs, and when he was so intoxicated he became frantic and very violent in his actions, and appeared to be insane; and prior to and at the date of the said alleged will his mind and memory had become seriously and prejudicially impaired and affected in consequence of the immoderate use of intoxicating liquors, and his health and bodily vigor had also become and was impaired and weakened, and the illness from which he died had been brought on through or by reason of his intemperate habits: that prior to and at the date of the said alleged will, the said *William Houghton Bell* was living with and under the influence of *Elizabeth Bywater* in the said bill named, and had become and was estranged from his family, and from the state and condition of his mind and body he was easily influenced; that before and at the date of the said alleged will, and before and at the date of the codicil thereto, the said *William Houghton Bell* was not of a sufficiently disposing mind and memory to make a will, nor in a state of mind to make any disposition of his property, and was wholly unfit and unable to dictate or make a will, and was of unsound mind, or his mind had become weakened and impaired so that he was unable to understand business or to give any instructions for the disposition of his property; and that

Statement.

1880. at the respective times the said will and codicil were drawn the said *William Houghton Bell* did not know or comprehend the disposition which was thereby made of his property, and at the respective times he signed his name thereto he did not know or understand the contents thereof or of either of them, or know or comprehend that he was thereby depriving his family of the greater part of his property; and that if he had been in a proper state of mind he would have left his property to his family; and that he continued in the same state and condition up to the time of his death.

Bell
v.
Lee.

Statement.

The defendants further alleged that during the last illness of the said *William Houghton Bell* his family were excluded from him: that he was ill for some time before his family were aware of the fact, and his family were kept in ignorance of his condition, and of what he was doing, and were kept in ignorance that a will was being prepared, or that he had executed any will until the same had been signed: that the family of the said *William Houghton Bell* were on one occasion excluded and refused admittance to see him, and every effort was made to keep the said *William Houghton Bell* and his family apart, and such effort was successful, and when any member of his family was present with him some other person always remained in or near the room, and his family were never able or allowed to see him alone except on one occasion, and the mind of the said *William Houghton Bell*, previous to the respective times of signing the said will and codicil, was continuously prejudiced against his family, and every effort was made so to influence and prejudice the mind of the said *William Houghton Bell* against his family, that he would dispose of his property so as to deprive them of the same, and that the family of the said *William Houghton Bell* were not informed of his illness until after the said alleged will had been signed, and that his family were kept in ignorance of

his illness in order that they might not be in a position to influence the said *William Houghton Bell* against making the said will. And by way of cross relief prayed that the said will and codicil might be declared void and be delivered up to be cancelled.

1880.

Bell
v.
Lee.

The infant defendants also put in an answer similar in effect to that filed by the other defendants; and the cause having been put at issue, came on for the examination of witnesses and hearing at the sittings of the Court at Toronto, in the month of June, 1880.

Mr. *Bethune*, Q. C., Mr. *Moss*, and Mr. *W. Barwick*, for the plaintiffs.

Mr. *Blake*, Q. C., and Mr. *A. Hoskin*, for the defendants *Catherine F.* and *Laura Bell*.

Mr. *McCarthy*, Q. C., and Mr. *Plumb*, for the infant defendants.

Mr. *MacLennan*, Q. C., for the defendant *Elizabeth Bywater*.

Mr. *Henry O'Brien*, for the defendant *Walter S. Lee*. Argument.

Evidence was taken at great length establishing very conclusively that for some years prior to his death, *William Houghton Bell* had become a perfect slave to liquor: that in consequence of his neglect of his family and cruelty to his wife she and her four children had lived apart from him for about twelve or thirteen years before he died; his habits having during that time continued to grow worse, until finally his constitution became completely undermined by the use of intoxicating drinks.

Thomas H. Lee, a brother-in-law of the deceased, the father and next friend of the infant plaintiffs, was examined as a witness in the cause, and in the course of his evidence swore that the testator's brother, *Charles Bell*, had told him *William* wanted to make a will, and that in consequence he went to see *William* but did not mention the will, as witness thought probably he

1880. would speak on the subject himself, and being afterwards asked by *Charles* if he had spoken to *William* on the subject, witness said he had not, and that "*Dr. McCallum* has seen him and says he is very bad, and if he has any worldly matters to think of he had better have them put in order." That this was after the *Dr.* had seen him, and witness "told *William* 'Do you want to make a will,' and he said he did, and I said 'Who do you want to have sent to make it?'" That the testator suggested getting a *Mr. McKenzie*, to which the witness objected as he was not a professional man, and recommended testator to "have a proper solicitor, one who understands how to do these matters, and one who understands your father's will * * I then asked him if he knew *Mr. Scott*, of *Robinson & Scott*; I thought he was a good solicitor * * he said 'Yes, he would do,' and I might send him up." That in consequence witness saw *Mr. Scott* and arranged with him to go the testator's, which he did in company with the witness. In answer to the question "What was his condition of mind on that day when you saw him?" the witness said "He knew what he was talking about, and offered me a torn up will and said to take it down to *Mr. Scott* and tell him that was the way he wanted it made; and I said no, I do not want to know anything about your affairs, but when your solicitor comes up you can tell him about it, and he sent *Miss Bywater* for the old will that was torn, and I said I did not want to know anything about his will, and I went away, and *Mr. Scott* asked me to go and send up some one else to be the second witness, and I called in and asked *Mr. Banks's* clerk to go up, that *Mr. Scott* wanted to see him. Q.—And you think his mind was clear? A.—Oh, he knew what he was doing, what he wanted, quite distinctly, for he explained to me about the money that he wanted to get, and everything." The witness also proved that at his instance the testator had consented to make the codicil to his will by which he left

Hill
v.
Lee.

Argument.

\$200 a year to his daughter *Laura* during the life time of his brother *Charles*, and \$3,000 to be paid her at his death, as set forth in the bill. In the course of the evidence it appeared that the defendant *Mrs. Bell* had a child buried in the plot in which were interred the bodies of Mr. and Mrs. *Thomas Bell*, and that the witness *Lee* had desired to move the body of the child a short distance, which Mrs. *Bell* refused to allow him to do, and

1880.

Bell
v.
Lee.

"Q.—Mrs. *Bell* has said that you had a quarrel with her in consequence of this proposed change in the grave of this little child? A.—Yes; we had some little words. Q.—She says that you then threatened her that you had been her friend before that? A.—No; I never threatened her; it was all made up apparently; I never threatened anything of the sort. Q.—She suggested apparently that you brought about this will out of revenge for what took place then? A.—No; what I said was this, when I asked her to allow the child's body to be removed about a foot and a half or two feet to allow my wife's grave to be made, she got into a passion, and said she would have done it to please me, but as my wife and her were not good friends when she died, she would not have done it on any account; and I said, 'It is the first time I have asked a favour of you, and I shall never ask another favour of you, and I do not want to have anything to do with you or your family; it is the first time I have asked you, and never ask me to interfere in your affairs, or befriend you.' Q.—Had you heard of any will being made by *William Bell* before this one? A.—Mrs. *Bell* told me that he had made one; I knew it, because he had told me himself that he had made one. Q.—When was that? A.—That must be three years ago; I do not know the exact date. Q.—Was that one said to have been signed at *Charles Bell's* house? A.—Yes; I think that was the one that I am alluding to. Q.—She says that you promised to get *William* to destroy that, and that you afterwards brought it to her torn in two? A.—Yes; she came to me and said that *William* had made a will—I did not know what was in it—and she says, 'Now, you get him to destroy that will.' 'Well,' I says, 'I did not* influence him to destroy the will, but if you continue provoking him all the time, it is impossible to get him to do all the things you require;' and said I, 'I will see what I can do with him;' and *William Bell* wanted to get some money—what he always did. 'And now,' says I, '*William*, if you destroy that will you have made, because your wife—' I did not tell him that, for if I had told him that his wife wanted him to destroy it, he would not destroy it—says I, 'Now, you destroy that will—you do not need any will; your family is right enough without any will; you destroy that will, and I will try and get the matter arranged for you;' and he told me he would. Q.—Are you aware whether he did or not? A.—Well, I really forget whether he gave it to me torn in two, or told me he destroyed it, but I told Mrs. *Bell* that he had destroyed it—that he told me so, and I believed it was."

Argument.

In the course of the evidence, it also appeared that the deceased had assigned as a reason for declining to do anything by way of advancing the interests of the

* The word "not" is evidently an error.

1880. youngest daughter, that he never considered that
 Bell v. Lee. "Baby" was his, and the same witness, *Thomas H. Lee*,
 further swore that deceased had told him he considered
 the child was not his; and

"Q.—You gave that as one reason for his not having left anything to baby? A.—I do not know only from what Mr. Bell told me, Q.—You gave that as one reason for not giving anything? A.—That was the reason he said he would not give anything to the youngest child. Q.—It was correct what you told her [the mother] about that, that he did say that? A.—Oh yes, he said that. Q.—Did you try to disabuse his mind of that impression? A.—I told him it was all nonsense. Q.—And you knew it was all nonsense? A.—I did not think there was any truth in it. Q.—And you never did think so for a moment? A.—Yes, but he had said so before. Q.—And you did your best to disabuse his mind of this nonsensical view? A.—I said he ought not to think anything of that with the girls, he ought to make it all right for them; I said very little to him; I said I thought there was no truth in that; I do not think he made any remark; I think he said he was satisfied with what he had done. Q.—This was not the first time he had named this to you? A.—The only time since his sickness. Q.—But he had named it before? A.—Yes; whenever he was angry he would mention this, and say, 'I do not think that is my child.' Q.—And so it seemed to be a rooted idea of his? A.—I think he always had that idea. Q.—And that it remained with him at the time he was making his will, and was, as he expressed it, a moving cause? A.—I think that was his idea. Q.—And he gave it to you as the cause of his cutting her off? A.—Not leaving anything to her. Q.—When did he first speak of this to your recollection, of the matter of the babe not being his? A.—Oh, he has spoken of it for some years. Q.—Soon after she was born? A.—No, I don't think so; I suppose it must have been five or six years back; sometime after he had separated from his wife. Q.—At that time what was his state of mind? Was he all right in his mind? A.—Yes; when he first left his wife he did not take anything to drink to any extent; I did not see him. Q.—So that he was all right in his mind? A.—Yes. Q.—When he spoke of this? A.—Yes. Q.—Perfectly sane in his mind? A.—Yes; quite so. Q.—Did he ever mention on any occasion, the reason for thinking this? A.—No; I do not remember him ever giving me any reason; he simply said from circumstances he was pretty certain she was not his child, that was all that he ever said; he never gave me any circumstances other than that."

Argument.

On behalf of the plaintiffs it was insisted that although it might readily be admitted that the evidence tended to shew an over-indulgence by the testator in habits of intoxication, it fell far short of establishing anything like unsoundness of intellect, or lack of a disposing mind and memory at the time he executed the will now under consideration; and if even the Court should now be of opinion that at one time the testator did labour under some insane de-

1880.

Bell
v.
Lee.

lusion in respect to the legitimacy of his youngest child, that was long anterior to the execution of the will. And the evidence fails to establish any such insane delusion at the time of its execution as should deprive a person of testamentary capacity; and even if the testator up to the time he had the impression and firm belief that this child was not his off-spring, that it was submitted could not now be adduced as proof of an insane delusion; besides, the evidence fails to establish that the testator proceeded upon or was actuated by this belief at the time he gave instructions for and signed this will; the most that it establishes is, that that opinion was assigned by him as a reason why his will should not be altered; and as the difficulty in the case had been caused entirely by the act of the testator, it was a case in which no costs should be given against the plaintiffs, if even the Court should refuse to establish the will.

On behalf of the defendant *Elizabeth Bywater*, it was contended that the testator had absolute power to dispose of the estate left to him by his father's will, and therefore that the defendant was entitled to receive for her own benefit the insurance moneys bequeathed to her, freed from any charge in favour of the estate of the testator, and there was nothing to shew that if the testator was labouring under any mental delusion it affected in any degree the bequest in her favour, and, under any circumstances, she was clearly entitled to her costs of the suit, no matter what the result of the litigation might be.

On behalf of the defendant *Bell* it was contended that under the will of *Thomas Bell*, the father of the testator, the testator was empowered only to execute an appointment as to a portion of the estate given him by his father, which provides that he shall be at liberty to devise the property to his child or children, or to his brother or sister, or to their child or children: and that the intention of the father was evidently that



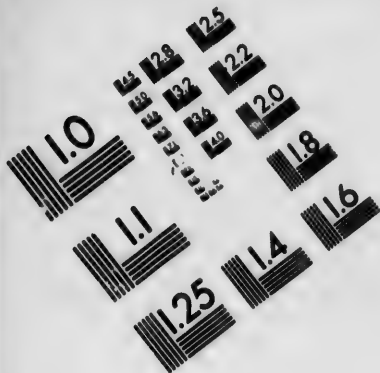
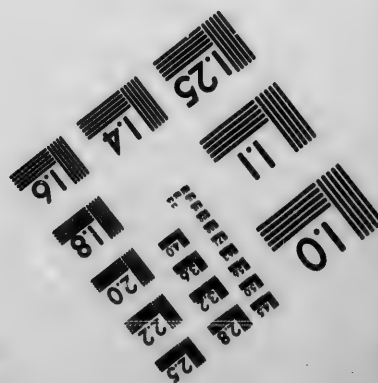
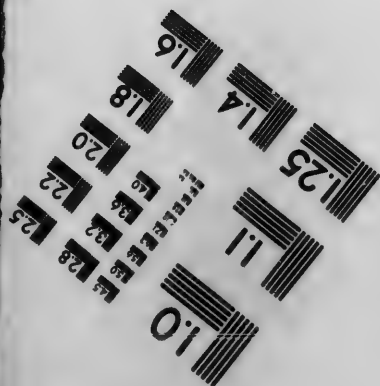
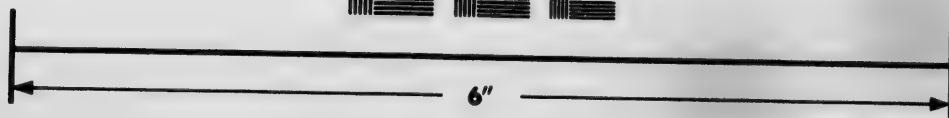
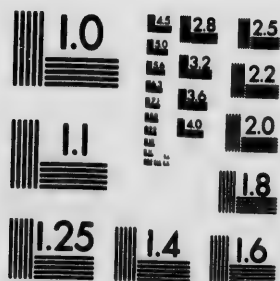


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1880. his son, in the event of his leaving children surviving him, should be entitled to devise the estate to such children; and the power to devise it to his brother or sister, or their families, only arose in case he himself should die childless; that is, the Court might now read the will as if it provided that the devise should be to his or her own child or children, or in default of children then to the brother or sister, and if neither brother nor sister survived, then to their children; and that the language used by *Thomas Bell* in the eleventh clause of his will bore out their contention in that respect, as he there provides that, "In case of either of my sons or my daughter dying without a will, as hereinbefore appointed, and leaving lawful issue, then, and in such case, the share of such one so dying shall go to and belong to the child or children of such one so having died without leaving a will, share and share alike, if more than one. And if either of my said children die without lawful issue and without having made a will, as hereinbefore appointed, then the share of such child or children so dying without issue or without leaving a will, shall go to the survivor or survivors of my own children, share and share alike, if more than one surviving; and if only one, then to that one;" &c.

Argument.

It was also contended that in any event the will and codicil of the testator were inoperative, as they were not a compliance with the power given by *Thomas Bell* to his son, as he was bound by his father's will to select one of the several objects therein mentioned, that is, he was bound to devise either to his own child or children or to his brother or his sister, or their children; and was not at liberty to devise the estate to all these persons, or to one or more of each of the classes named; that by the use of the words "their child or children," *Thomas Bell* evidently meant that his son should not be at liberty to devise to the child or children of either his

1880.

Bell
v.
Lee.

brother or sister to the exclusion of the child or children of the other; he was clearly bound to devise to the children of both, and this he failed to do.

Counsel also contended that the evidence was sufficient to establish the fact that the testator was not of a sufficiently sound and disposing mind and memory to make a will, and that therefore the will and codicil now sought to be established could not be looked upon as his last will and testament; and even if not of completely unsound mind the evidence sufficiently shewed that these instruments had been executed under undue and improper influence exercised over him by *Thomas Hawkins Lee*, *Charles Thomas Bell*, and the defendant *Elizabeth Bywater*, and was in fact obtained by fraud and undue influence. Under the most favourable aspect of the case, it was certain that the testator was in such a state, mentally as well as bodily, that he would be assumed to have been unable to resist undue influence and pressure; and that he was incapable of duly weighing and appreciating the ties of his family and their claims upon his consideration; under such circumstances the plaintiffs must establish satisfactorily that he had mental capacity to make the will, and that no undue influence was used to induce him to make it.

Argument.

The cases principally relied on appear in the judgment.

At the conclusion of the argument,

SPRAGGE, C.—There are two or three questions in this case, but the first that naturally presents itself is that of the testamentary capacity of the testator; and in regard to that, we have the evidence of four medical men, and the evidence of a number of persons—acquaintances and friends of the unfortunate deceased gentleman—upon that point.

Judgment.

In regard to the evidence of *Dr. Constantinides* and *Dr. Thorburn* particularly, I would observe, that they

1880.

Bell
v.
Lee.

described the general characteristics of the disease under which this man laboured; that its effect, from the abnormal secretions which were made, and which I need not more particularly describe, was to poison the blood and have a tendency to gradually impair the mental capacity, until, at the time that the will was executed, the man had by no means the strength, either bodily or mentally, that he had originally before he took to these unfortunate habits and this disease got a hold upon him. Nevertheless, we must look upon the evidence, and what actually took place at the time of the execution of the will; but before that there is evidence, not only of the deterioration from time to time mentally and physically of this man, but there is evidence also of persons who knew him, and who spoke to him, and who speak, among other things, of his being so far gone—as they supposed—as not to know them, even when he met them on the streets. I think that that may admit of

Judgment.

explanation. They were persons who had known him in his better days but had gradually dropped out of his acquaintance, and a man of his capacity—formerly occupying a respectable position, and of an old and respectable family in the city—might be very sensitive, and might wait to be accosted before he would acknowledge the presence of those who had saluted him. One witness speaks particularly of that—that when he went into the house he looked at him with a sort of dull stare, and took no notice of him; his inference was that he did not know him, but as soon as he accosted him in the old familiar way, “Well, Billy, my boy, how are you?” he expressed great pleasure in seeing him. That is just the conduct we would expect from a person of that kind who knew that he had fallen very much in the social scale, and probably was too sensitive to address persons when he knew his address might not be acknowledged. I think it is not very great evidence of mental deterioration, but some certainly; and that is one class of evidence.

Then there is the evidence of the daughter *Laura* and the son, who were advised to visit him. The former thinks that at first he did not know her. This was at the time, or about the time, of the execution of the codicil—whether before or after I do not know—but at that time there had been a great deterioration through the illness under which he was suffering, between the time of the execution of the will on the 30th of October, and when this passed on the 5th of November, but even then it is material to know what passed between them. He was brought to recognize them, and spoke to *Laura* and addressed her by name; but the material part was when she called the next day, he did not appear to know her, and spoke as if it were an aunt who had called the previous day. Some importance is to be attached to that circumstance, though I do not attach very much to it, for the aunt had been visiting him frequently, and his mind was to a great extent impaired as well as his memory, and he might confuse the visit of one with that of the other; and she found him in a dozing condition, but when roused he knew her, and speaking also to his son, whom he called back to him as he was retiring—gave him fatherly advice, as well as alluded to the unhappy relations which existed between himself and his family; not very pointedly, but still spoke in allusion to that fact. That is about the evidence there is as to his mental condition; but against that there is the evidence of what actually occurred at the execution of the will.

In the case to which reference has been made, and to which I have referred—of *Waterhouse v. Lee* (a), there was a good deal of medical evidence also, and some of the medical men said that they did not think it possible at the time there was a manual execution that the testator could have possibly had sufficient capacity to understand what he was doing.

1880.

Bell
v.
Lee.

Judgment.

(a) 10 Gr. 176.

1880.

Bell
v.
Lee.

Judgment.

I said then, p. 186—and I am of the same opinion still —“ But I am not convinced by the medical testimony or otherwise, that he might not have been in such a state on the morning or at noon or early in the afternoon of the 8th, whichever may have been the time of day at which the will was executed. If the medical witnesses had said the thing was impossible, I must still have exercised my judgment between facts sworn to and matters of scientific opinion; and facts may be established by such clear and convincing testimony in the face of opinion evidence by scientific men, that they must be accepted as established, although, in the opinion of those well qualified to form a scientific opinion, they are held to be improbable or even impossible.” Well, I should act in the same way upon evidence of that kind of medical men; I think it very likely that Dr. *Constantinides*, and Dr. *Thorburn*, and Dr. *Oliphant* thought that, by the time,—judging the time that had elapsed from the time they attended him to the time of his death,—it was almost certain that the deterioration would be so great that there would be no mental capacity left; but we find by the evidence given that men differ very much in that respect. But when we come to the evidence of what actually occurred, I think that the weight of evidence is in favour of his having mental capacity at that time. I will allude here to the evidence of Dr. *Givins*, which I think is very material on that point, at the time of the execution of the codicil, which was about a week after the execution of the will itself. It was suggested to the testator that it would be necessary that he should get an engagement or promise from *Charles Bell*, to fulfil a provision of the will—even though the law would not impose that as a duty—and he appears to have appreciated and understood that and agreed to it. That, I think, is a strong proof of his having mental capacity at that time; and the doctor also gave proof of this, that he talked with him and understood him and spoke

1880.

Bell
v.
Lee.

rationally; and when he pressed upon him the duty he owed to his family, that he perfectly understood—Dr. *Givins* had no doubt that he thoroughly understood it—though he did not agree with him; he had, however, no doubt of the mental capacity of the man to understand what he said. In my opinion he knew, and the evidence shews that he knew, what he was doing—that he knew those who had claims upon him; and though he might in my judgment, and in that of all right-thinking men, have acted wrongly, still he knew well who were the objects of his bounty, and he knew the property with which he was dealing.

The judgment of Lord Chief Justice *Cockburn*, in the case of *Banks v. Goodfellow* (b), is very explicit on that point. His Lordship says: "The question which their Lordships propose to decide in this case is, not whether Mr. *Baker* knew, when he executed this will, that he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition; though the justice or injustice of the disposition might cast down some light upon the question as to his capacity." That is the test by which it must always be tried.

Judgment.

To come then to the point of undue influence. I have no doubt from the evidence that *Lee* possessed great influence over the mind of *Bell*. It was shewn in various ways—much more influence than his brother *Charles Bell* had, I have no doubt. He suggested that

(b) L. R. 5 Q. B. at 551.

1880.

Hall
v.
Lee.

he should destroy as unnecessary a will that he had made, and which he did destroy, I judge, in accordance with the suggestion; and that he had it destroyed because the property would be well disposed of without a will, which was the effect of his having interceded. Then there was this consciousness of possessing this influence in what passed between himself and Mrs. *Bell* in regard to the giving up of the child's grave, which was accompanied by a threat that she need not look to him for the furtherance of her interests after her refusal. Then *Charles Bell* treated him as a man that possessed an influence. We must consider, in dealing with this matter, the position of the parties, and the relations of the deceased with his wife and family, his brother *Charles*, and the woman *Bywater*; and the question is, how did *Lee* exercise this influence? He did possess it, and did exercise it to a certain extent in favour of *Laura*. I cannot help referring here to the evidence of *Lee*, and also to the evidence of *Charles Bell*, as to their affected indifference as to the contents of the will. We hear these men say in Court that they did not even give the matter a thought; that is, that they did not give a thought to that which was necessarily for their own interests. Now, is it credible that such was the case? They might have been able, if right thinking men, to resist the influence that such a thought, and such a powerful advantage would give them. But granting all this to be the case, was there what the law calls undue influence, which is a different influence from what the word embraces in popular phraseology? There was, no doubt, existing in *Lee* an influence arising from former business relations between them. No doubt, under the circumstances that existed between them, their business relations, seeing him frequently, and not being on such good terms with his brother *Charles* as with *Lee*, he would be easier persuaded by the latter than any one else; but that would only be persuasion, what in popular phraseology

would be influence, but not undue influence, and it is not a domination by the will of one person over that of another. I will here refer for a moment to what I said in *Waterhouse v. Lee*. "I take the law to be, that mere influence exercised by a wife or other person over the mind of a testator is not of itself sufficient to invalidate a will, that it must amount to a control over his mind, subjecting his mental will to the desire of another, so that the document executed as his will is not in reality the expression of *his* will but that of another." That, as far as I am aware, is not an over-statement of what is required to constitute undue influence.

1880.

Bell
v.
Lee.

We come now to another point upon which counsel has rightly laid great stress, and which has more influence with me than any other, and that is *Bell's* idea as to his youngest child's illegitimacy. It is, I confess, a difficult question to deal with, and I admit that this feeling must amount to an insane delusion. The question is, did it in this case amount to an insane delusion. There is some language in a case which Judgment. would make it go not quite so far as that; "morbid affection of the mind which a party cannot get rid of," and that is such a feeling, such an unreasoning prejudice, as would in some cases amount to an insane delusion. It may fall altogether short of insane delusion, and it may be, looking at all the circumstances, so palpably absurd as to be unaccountable, except upon the theory of insane delusion; that I take to be the law upon the point. There is the *Greenwood Case* (a), and the case of *Smee v. Smee* (b), and the leading cases upon that point, but upon this case the conduct of the parties have a material bearing. This idea originated, so far as we have any evidence, in 1874. The infidelity of the wife must have occurred, if there was such, in 1864; the child was born in the autumn of 1865. Then what had passed between the

(a) 1 Add. Ec. R. 283, n.

(b) — R. 5 P. & D. 84.

1880. husband and wife in the meantime is very material. A separation occurred between them in 1867. In that year, whether actually before or after the separation it does not very clearly appear, he began to live with this other woman, the woman *Bywater*; whether the separation occurred first, or the living of the husband with this woman occurred first, does not appear, but what is material is the letters that passed between the husband and wife. One—from the wife—is certainly a very extraordinary letter, which Mr. *Bethune* has commented upon very cogently and with propriety too, for it is an extraordinary letter, and there is a great deal in it which looks like self-accusation; it looks like the outcome of a self-accusing conscience; but we must read the letters together.* The husband does

Bell
v.
Lee.

Judgment.

*The two letters here referred to, were as follows :

ORILLIA, Sept. 5th, 1872.

MY WILLIE,—I am very ill, and I cannot rest until I see you ; for nights I have been unable to sleep, until the heavy weight on my brain is unbearable. I must see you, if only for once again, to tell you all that I have kept locked up in my breast for years. I have been too proud to ask you before, but now sickness has humbled me, and the proud feelings that I have nursed all this time have burst their bonds ; and last, I cannot come to you ; but oh, Willie, do not refuse me for our daughters' sake, whom you will yet be proud of ; come and listen to me now ; I can hardly write, I am so agitated ; I shall never be worth anything again unless I relieve my mind of what is preying upon it, poor miserable woman that I am. My husband, you will not refuse me, will you ? but come on Saturday, and if you must, you can return on Monday. Please, my Willie, do not refuse me, for I know it will be better for both of us that you should hear me now.

Your unhappy wife, FANNY.

[The letter in answer to this was not among the exhibits.]

ORILLIA, Sept. 11th, 1872.

WILLIE,—I received yours, and in answer beg you to forget my foolish letter : yours is only just what I deserved ; for after bearing up against every difficulty for five years, what right had I to have any tender thoughts or memories left ; my only excuse is that I was very unwell at the time, and things seemed more than usually gloomy, but your mocking has braced me up again, and I dare say will enable me to keep a strong heart for a year or two more. If sorrowing for our children's lost opportunities and neglected education sometimes unnerves me, and regret that such things should go on till their prospects for life are destroyed, you must let all this be my excuse for the weakness I have unfortunately shewn ; further, I was not aware I had done anything to offend you when here, as I really had no such intention. * *

Yours, etc.,

KATE.

not read it in that sense, if we read the following letter, in reply to his, in which she takes back what she had previously said. Then there is a great deal of correspondence between the husband and wife, in which he professes very great repentance. There is on the part of the wife, it strikes me, an overstrained bearing towards him, and a refusal to entertain his proposition for a re-union, unless she puts him on probation, and I cannot say that she may not have had reason for all this; but her bearing in that towards him was such as a woman would have who was possessed of an imperious temper, but who, at all events, felt conscious that she herself was strong in her own innocence. A woman who had been unfaithful, and had given birth to a child—the child of another man than her husband—would live under the constant fear that such would probably be found out, and would scarcely venture to adopt towards her husband the manner, and language, and conduct which this woman did manifest towards her husband during the series of years from 1867 to 1874. During all that time that was the conduct and the strong conviction—so far as the letters show which passed between them—on the part of the husband. Some penitent letters are put in on his part; and notwithstanding that the woman felt herself deeply wronged, and deeply injured as a woman would be by the infidelity of her husband, still there appears to have survived all that strong affection on her part towards him, and what I think material is the bearing towards him that she felt herself able to maintain all through these years.

Well, this continues till 1874; in 1874 or 1875 she comes to Toronto. The first we hear of this talk of infidelity is some ten years after it occurred—if it did occur. Well, there is not now at this moment a scintilla of evidence that there was the slightest groundwork for such a charge. We must look at the condi-

1880.

Bell
v.
Lee.

Judgment.

1880.

Bell
v.
Lee.

Judgment.

tion of the man at that time, growing worse and worse, in a state of separation from his wife, as she held aloof from him and refused his advances; his living with another woman at the time; all the efforts at reconciliation failed. There is no doubt that at that time, in 1875, there was a feeling of extreme resentment on the part of the husband towards his wife, and there is a manifestation of it in the torn will (that, however, is at a later date), and his state of mind at that time; and there is that which we know exists in many persons, a disposition to feel resentment against those whom they themselves have injured; there appears not the slightest ground for this idea, but all at once it comes, without any occasion, into his mind. There is evidence that at times his resentment towards his wife was extreme, and he was ready to catch at anything against her. There is a line that occurs to me: "Earth hath no hate like love to hatred turned." That is applied, in the case I am quoting, to a woman: it may exist also in the mind of man. Well, at first in 1874, it appears to have got into this man's mind; but *Lee*, who knew him perhaps more intimately than any other man, thought little of it, and told him it was all nonsense, and that he ought to disabuse his mind of the idea; but looking at the relations of the parties, and his impaired intellect—his relations with the rest of the world as well as with his wife—nothing is more probable than that a thing without any foundation at all would be brooded over by him until he came at last to believe in its truth. Whether he believed in its truth in 1874 may be doubted, but that he brooded over it and thought of it until it became a settled conviction in his own mind as a fact, is I think a fair inference from all the evidence and facts, and it is unaccountable excepting on the theory I have suggested. Then it amounts, I think, to what is called by Sir *James Hannen* an "insane delusion." It is certainly a very difficult question, speaking generally.

1880.

Bell
v.
Lee.

No doubt arises where the nature of the delusion said to exist is this (quoting from *Sir James Hannen*): "When it is alleged that a totally false, unfounded, unreasonable, because unreasoning estimate of any person's character is formed. That is necessarily a somewhat difficult question. It is unfortunately not a thing unknown with parents—and in justice to women I am bound to say that it is more frequently the case with fathers than mothers—that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit, beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them injury, or deprive them of advantages which most men desire above all things to confer upon their children. I say there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind." (a) I think that truly describes, in much better language than I can use, the conviction, so far as I can find, formed in this man's mind. He had quite as much ground of objection to *Laura* and to *Edith* as to this child. *Laura* was older, and *Edith* also was older than this one, and they behaved to him, as he said, badly, just as this child had; yet with *Laura* it was overlooked, and with *Edith* it was overlooked; and when it was suggested that in this child it might be overlooked—that this child, called "baby," should be included in his bounty—this is the reason he gives, and this is the reason, as far as I can form any judgment, for disinheriting her in the will; resting upon this, to me, perfectly unaccountable

Judgment.

(a) *Boughton v. Knight*, L. R. 3 P. & D. at p. 69,

1880.

Bell
v.
Lee.

idea that had taken possession of his mind, resting upon a suspicion—resting upon nothing whatever excepting upon some idea that in some way had got hold of his mind, and which in the peculiar position he was he had brooded over, arising no doubt from a feeling of resentment towards the mother—not attaching the same suspicion to earlier children, but choosing to place it upon this child, and without a scintilla of ground that can be even suggested for his entertaining such suspicion, excepting the unaccountable aversion that he had taken to her, and the unaccountable idea that had taken possession of his mind. It was suggested, I think by Mr. *Moss*, that it might be that he gave an untrue reason—that he really did not believe this, but that he chose to give that reason. I cannot agree with that. That gives no reasonable account of it. Of course, a person may give untrue reasons for a thing, and for the motives in their own mind for doing it, but nothing of that kind applies to this case.

Judgment. Therefore, though this is a point I admit a very difficult one, my conclusion from the whole of the evidence is, that in respect of this child the will cannot stand, and that he died intestate so far as that portion which would otherwise belong to her is concerned.

Mr. *McCarthy*, Q. C., submitted that the delusion as to one child, and intestacy as to the portion of such child extended in its consequences to the whole will; that it was impossible to say that the deceased, if not influenced by this insane delusion, might not have given the whole of the property to this same child.

After some other remarks, it was agreed that further authorities should be submitted on the point to his Lordship, and on a subsequent day.

Sept. 9th.

SPRAGGE, C.—I disposed of the case at the hearing, except as to one point, upon which authorities were to be cited to me. I held that the testator omitted to

make any provision in his will in favour of his daughter *Clara Victoria Fanny Bell*, under the influence of an insane delusion in regard to her legitimacy; and the point I reserved was, what effect is thereby produced upon the will, whether it is rendered wholly inoperative, or inoperative only in part.

1880.

Bell
v.
Lee.

For the plaintiffs and the defendant *Bywater* it is contended that it is rendered inoperative only in part; but when the point comes to be considered, the difficulty of so holding appears to be insuperable, for it is simply impossible to say what disposition the testator would, but for this insane delusion, have made of the property derived by him under his father's will, either in regard to his daughter *Clara*, or his other children. If he had devised to his other children in equal proportions, there would be some room for the inference that he would have dealt with her as with the others, but for the delusion which intercepted his natural good will to her; though I am not prepared to say that the Court would be warranted in drawing that inference. But Judgment. there is, at any rate, no room for that inference, for he left it to his other two daughters unequally; to *Edith*, by will, one-fourth of income, and after the death of *Charles*, his brother, one-fourth of his estate; while to his daughter *Laura*, he left by a codicil \$200 a year, and after the death of *Charles*, the sum of \$3,000. He left nothing to his son, who had grievously offended him.

I am referred to two cases as authority for the position that the will is inoperative in part only. In one of them, *Lord Trimbletown v. D'Alton (a)*, the will of the testator was impeached on the ground that it was obtained through undue influence exercised by his second wife. There was a trial, and an order for a new trial, which order was appealed to the Lords. The Lords felt that they could not pronounce judgment

(a) 1 Dow & Cl. 85.

1880. upon the case as it stood, and that it was necessary to send it back to the Court below; and upon this Lord *Redesdale* said: "Suppose the last will of Lord *Trimlestown* to have been executed under the improper influence of Lady *Trimlestown*, that might be a good reason for its being inoperative as far as she was concerned, but it did not follow that it was inoperative as to the whole of it; and then the question would arise, how far the prior instrument would be affected by this influence?"

Bell
v.
Lee.

Judgment.

Lord *Eldon* said: "There is a material point here which was not raised below, namely, whether the testamentary papers might not be invalid as to some of the items, and not as to the whole. We had a case not long ago, in which a will was found invalid as to the person who suggested it, but valid as to the other parties. Part of a will or testamentary paper may be good as to one part, and bad as to another; and that renders it important that the jury should find specially in what manner and words the devises were made which they thought valid."

The other case, Lord *Guillamore v. O'Grady* (a), was before Lord *St. Leonards* when Lord Chancellor of Ireland. The will of Lord *Guillamore* was impeached, first on the ground of want of testamentary capacity; and secondly, that certain devises contained in it were inserted by means of undue influence exercised upon the testator. The learned Chancellor did not approve of the terms of the issue to try the validity of the will submitted to him, and said: "I think the better way would be to take the parts of the will which are not disputed on the ground of undue influence, and ask the jury whether the testator made those devises. That will raise the question of sanity. Then take the other parts, which are disputed, and ask, whether he made those devises."

(a) 2 J. & Lat. 210.

1880.

Bell
v.
Lee.

I do not understand (as it is suggested) that both issues would necessarily be tried. If the testator were found to be not of testamentary capacity, the issue as to undue influence would become immaterial. I do not find any case in which it has been solemnly determined that a will successfully impeached on the ground of undue influence, may yet stand good as to portions of it. But assuming the law to be so, it would be a very different case from the one before me. In such a case the only decree could be that the portions so successfully impeached should be stricken out from the will, and it would be declared, that as to such portions the testator had died intestate. In that there would be no practical difficulty. But in such a case as this what would have to be done, if part of the will is to stand, would be to insert in the will what the Court supposes the testator would have had in it, in favour of his daughter *Clara*, but for his delusion in regard to her. But how can I tell what that would have been? To do what is asked, would be making a new will *pro tanto* for the testator. I may think it probable that he would have left her one-fourth, but that would be only a surmise; he might have left her more, or he might have left her less; and I think I may safely say that the Court has never taken upon itself so delicate, I may say so impossible an office as to insert provisions in a will which the Court may conceive the testator would but for some mistake as to facts himself have inserted.

Judgment.

In *Dew v. Clark* (a), and in *Boughton v. Knight* (b), the whole will was pronounced against, and I see no escape from the conclusion that it must be so, for one of the elements of testamentary capacity is the capacity to understand and appreciate who are the proper objects of the testator's bounty; or, as it may be put in this case, who had the proper claims which

(a) 3 Add. Repl. Rep. 79.

23—VOL. XXVIII GR.

(b) L. R. 3 P. & D. 64.

1880.

Bell
v.
Lée.

nature gave upon his justice. The insane delusion of the testator in this case interfered with his capacity to see this, and thus one element of testamentary capacity was wanting.

I think, however, that this insane delusion of the testator had nothing to do with the provision made in his will for *Elizabeth Bywater*; and if I could see my way to excepting that provision from the rest of the will, I would do so, to the extent, that is, that it was his to dispose of, apart from what he derived under his father's will; but not to the diminution of the fund derived from that will. I confess, however, I do not see how this can be done. It may be that the adult children of the testator may, so far as their interests are concerned, consent to this. It would be an act of kindly consideration on their part.

Judgment.

With regard to costs. It is not the case of a will propounded by executors, who for aught that appears might be justifiable, or at least excusable, in propounding it; but the plaintiffs are, one of them a beneficiary under the will and the other two are infants, beneficiaries under the same will, suing by their father and next friend, the latter being cognizant of the fact that the testator had given as his reason for excluding his daughter *Clara* from any provision under his will, her supposed illegitimacy, and I think having reason to believe that the reason so given had no foundation in fact. The plaintiffs may properly be regarded as contestants for their own benefit, and should pay the costs of the executor, and of the wife and children of the testator. *Elizabeth Bywater* stands upon a different footing. She makes common cause with the plaintiffs in supporting the will; and even if I thought that there was nothing in the position she occupies before the Court to disentitle her to costs, I do not see how I can give them to her out of the estate. It would be making successful parties pay the costs of an unsuccessful party, and that not out of the estate of a testator, by whose

fault the litigation has been occasioned, but out of another estate, not his, but an estate of which he was almoner under the will of the former owner of that estate. The defendant *Bywater* must be left to bear her own costs.

Bell
v.
Lee.

SUMMERS v. COOK.

Sale of standing timber—Realty or personally—Lien for unpaid purchase money—Injunction.

By agreement in writing, dated 15th October, 1873, *A.* agreed to sell and *B.* and *C.* agreed to purchase all the merchantable white and red pine timber, suitable for their purposes, standing, lying, or being on certain premises owned by *A.*, for the price or sum of \$600, payable \$400 on date of agreement, and the balance in one year, with a provision that the timber should be cut and removed off the lands, on or before the 15th of October, 1881. It was further provided that *B.* and *C.*, their agents, representatives, or assigns, should have the right to enter upon the premises at all times during the period for which the agreement was to continue in force, for the purpose of cutting and removing said timber; and that if *B.* and *C.* should remove the whole of the timber off the land before the expiration of the year, they would pay the whole of the purchase money immediately after removing the said timber.

Held, [*PROUDFOOT*, V. C., *dissenting*], that this was an agreement for the sale of an interest in land; that *prima facie* the vendor was entitled to a lien for unpaid purchase money, and that the circumstance that the timber was purchased by *B.* and *C.*, for the purpose of being cut down and used at their mill as soon as possible, did not deprive the vendor of the right to the lien.

Held, also, that the last proviso in the agreement, as to immediate payment of the purchase money in case of removal of all the timber before the arrival of the time for payment of the \$200, did not operate to destroy the vendor's right to the lien.

B. and *C.* did not pay the \$200, and after the expiration of a year from the date of the agreement assigned it to the defendants, who had no actual notice that the \$200 remained unpaid, but the agreement was registered against the lands.

Held, that the vendor was entitled to an injunction to prevent cutting and removing, by the defendants until the \$200 was paid.

Marshall v. Green, L. R. 1 C. P., Div. 35, commented upon and distinguished.

1880. The bill in this cause was filed by *Sarah Summers*,
Summers
v.
Cook.
against *John Larkin Cook*, *Zachariah Casselman*, and
Thomas Summers, (the husband of the plaintiff,) alleging that at the date of the agreement therein mentioned the plaintiff was the owner of the lands described: that by agreement, dated the 15th of October, 1873, made between the plaintiff (then named *Sarah McDonald*), of the first part, and *Zachariah Casselman* and *James S. Plews*, timber merchants and mill owners, trading under the style of *Casselman* and *Plews*, of the second part, the plaintiff agreed to sell, and *Casselman* and *Plews* agreed to purchase all the merchantable white and red pine timber suitable for their purposes, standing, lying, and being on the said premises, for the price or sum of \$600, payable as follows: \$400 on the date of the agreement, and the balance in one year from its date, the timber to be removed on or before the 15th of October, 1881: that the agreement was duly registered; that after the making of the agreement *Casselman* and *Plews* had removed a considerable portion of the said timber, but they had not paid the said sum of \$200: that *Casselman* and *Plews* had become insolvent, and their estate was in liquidation under the provisions of the Insolvent Act: that before their insolvency they had assigned the said agreement to the defendant *Cook*; that at the date of the assignment *Cook* had full notice and knowledge that the \$200 was then over due and unpaid; that after the insolvency, which took place in November, 1878, *Cook* and *Casselman* commenced to cut and remove the remainder of the red and white pine timber, and they threatened and intended to cut and remove the whole: that *Cook* pretended that he had the right to cut and remove under his assignment, and that *Casselman* was acting as his agent; that the plaintiff was entitled to a lien and charge on the timber and logs standing, lying, and being on the premises, for the \$200, and interest since the date of the agreement, and to an

Statement.

injunction restraining *Cook* and *Casselman* from cutting and removing the said timber, or any part thereof, and from removing that already cut, until the lien should be fully paid and satisfied; and praying for a declaration that the plaintiff was entitled as aforesaid, to an injunction; an account of amount due, and of the value of the timber cut and removed since the insolvency of *Casselman* and *Plews*, and for payment of the amount due to the plaintiff with costs.

1880.
Summers.
v.
Cook.

The defendants *Cook* and *Casselman* answered, setting up that the purchase of the timber was made by *Casselman* and *Plews* for the purpose of being cut and used at their mill, (they being mill owners, engaged in sawing timber and logs) as soon as possible: that this purpose was well known to the plaintiff at the time the agreement was made: that possession of the timber was given by the plaintiff to *Casselman* and *Plews*, at the date of the agreement: that they immediately, and without objection on the part of the plaintiff, took possession of the timber for the purpose of manufacturing it into lumber, the plaintiff reserving no right to retake the timber for the unpaid purchase money: that possession of the timber having been thus parted with, all rights the plaintiff might have had by way of lien or charge, if any such ever existed, was absolutely put an end to; and insisting that under the agreement and the circumstances, the plaintiff was not entitled to a lien. A further defence on the ground that the plaintiff had accepted promissory notes of *Casselman* and *Plews* for the balance of the purchase money, was set up, but this is not material to the present report.

Statement

The cause came on for the examination of witnesses and hearing at *Barrie*, before Vice-Chancellor *Proudford*, who at the conclusion of the argument dismissed the bill with costs, holding that on the construction of the agreement, and having regard to the fact that the timber was purchased for the purpose of being cut and

1880. used as soon as possible, the right to a lien did not exist: that it was in the contemplation of the parties at the time the agreement was made, that the timber might all be cut and removed before the \$200 was payable: that under the circumstances it was not unreasonable to hold that the plaintiff intended, when entering into the agreement, to look only to the personal liability of *Casselman* and *Plews*, and not to any lien upon the timber for payment of the \$200.

Summers
v.
Cook.

The plaintiff thereupon set the cause down to be reheard before the full Court.

Mr. *McCarthy*, Q. C., and Mr. *Ault*, for the plaintiff.
Mr. *Moss* and Mr. *W. Barwick*, for the defendants.

In addition to the cases referred to in the judgment, the following authorities were referred to and commented upon by Counsel.

Bingham v. Mulholland (a), *Smith v. Hudson* (b),
Holmes v. Hoskins (c), *McNeil v. Keleher* (d), *Ellis v. Grubb* (e), *McLean v. Burton* (f), *Brown v. Sage* (g).

Argument.

The following is a copy (omitting formal parts) of the agreement in question:

"The party of the first part has agreed to sell, and the parties of the second part have agreed to purchase all the merchantable white and red pine timber, *suitable for their purposes*, standing, lying, and being on, &c., for the price or sum of \$600, payable as follows, viz.: \$400 on the date thereof, the receipt whereof is hereby acknowledged, and the balance or remaining \$200, to be paid in one year from the date thereof.

"Provided, however, that the said timber and logs shall be cut and removed off said lot, on or before the 15th day of October, 1881.

"The said party of the first part covenants with the said parties of the second part, that she has a right to sell and dispose of said timber free of lawful charges, lien, or incumbrances thereon, of or by any person or persons whatsoever, and that the parties of the second part, their duly authorized agent or agents, representatives or assigns, shall have the right to enter in or upon the said lot or parcel of land at all times during the period for which this agreement is to continue in

(a) 25 U. C. C. P. 210.

(c) 9 Ex. 753.

(e) 3 O. S. 611.

(g) 11 Gr. 239.

(b) 8 L. J. N. S. 253.

(d) 15 U. C. C. P. 470.

(f) 24 Gr. 130.

force, for the purpose of cutting and removing said timber, doing no unnecessary damage. * * * The said parties of the second part covenant with the said party of the first part, to pay the said purchase money as above mentioned, and to fulfil, the terms of this agreement subject to the provisos and conditions thereof, affecting the said party of the first part, and that if they remove the whole of the timber off the said land before the expiration of the said year, they will pay the whole of the said purchase money immediately after removing the said timber."

1880.
Summers
v.
Cook.

It was in evidence that *Casselman* and *Plews* had entered and cut under the agreement soon after its date, and it was doubtful whether the plaintiff had any actual possession of the portion of the premises on which the timber stood; the only possession being that of a person who occupied a small clearing under an arrangement with the plaintiff.

BLAKE, V. C.—There is no doubt that, unless brought within some of the exceptions grafted on the general rule, a contract for the sale of growing timber is a contract for the sale of an interest in land: *Ferguson v. Hill* (a), *Mitchell v. McGaffey* (b). It is also equally clear that, generally speaking, there is a lien on the property sold for the unpaid purchase money, and that this lien, which exists as between vendor and vendee, is not lost when the property is transferred to a third party with notice: *Colborne v. Thomas* (c), *Flint v. Smith* (d), *Davis v. Bender* (e), *Rutherford v. Rutherford* (f), *McDonald v. McDonald* (g), *Burns v. Griffith* (h). Under the terms of this contract, if the purchase money were not in arrear, it might be argued with much force that the plaintiff could not restrain the cutting and removal of the timber; but at the time of the cutting and removal of the timber complained of the time for the payment of the whole of

Feb. 19th.
Judgment.

(a) 11 U. C. R. 530.

(c) 4 Gr. 102.

(e) 4 Gr. 620.

(g) 16 Gr. 678.

(b) 6 Gr. 361.

(d) 8 Gr. 339.

(f) 11 Gr. 565.

(h) 24 Gr. 451.

1880. the purchase money had elapsed, and \$200 of it was unpaid. Unless, therefore, this case be brought within some of the exceptions, the plaintiff is entitled to the relief which she asks.

Summers
v.
Cook.

Smith v. Surman (a), was cited for the defence, but it is clearly distinguishable from the present case. There the plaintiff, the vendor, was to cut down the trees, and the contract provided that the defendant should enter and carry away the trees when severed. It was not a sale of the trees growing on the land, but of the timber when cut down and severed, at so much per foot, and therefore not a contract for the sale of lands, or of any interest therein.

In *Ex parte Parkes* (b), the vendor consented to receive his purchase money two years after a resale of the premises the subject matter of the contract, and it was held that, impliedly, the vendee took the property discharged of the lien. In *Boulton v. Gillespie* (c), while the general rule was admitted, it was there held that as the land was held by a trustee for sale in a peculiar way, the *prima facie* intention of the lien in favour of the vendor was rebutted. In *Tansley v. Turner* (d), the timber, the subject matter of the contract, was, at the time of the agreement, felled and lying in the hedges, the land where the trees were lying was not the plaintiff's land. Some of the trees were taken at once, and all the others were marked: and, as the Chief Justice says, "that shews that no property was meant to be retained by the seller. The case, therefore, stands clear of the authorities cited."

Judgment.

In *Marshall v. Green* (e), much relied on by the defendant, the contract was: "The trees to be got away as soon as possible." And on this the judgment seems to have turned, for the Chief Justice says: "Apart from any decisions on the subject, and as a

(a) 9 B. & C. 561.

(c) 8 Gr. 223.

(e) L. R. 1 C. P. Div. 35.

(b) 1 Glyn. & Jam. 229.

(d) 2 Bing. N. C. 151.

matter of common sense, it would seem obvious that a sale of twenty-two trees, to be taken away immediately, was not a sale of an interest in land, but merely of so much timber. And the opinion of *Grove, J.*, is: "Here the trees were to be cut as soon as possible; but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for the trees during that period."

I think we have in this case an unfortunate extension of the intelligible rule, that growing trees are an interest in land, and that a contract in respect of them falls within the same rules as a contract in respect of land; and that it is to be regretted that this question is left to depend upon the length of time the party has to remove the property purchased. But, be this as it may, *Marshall v. Green* would have to be almost indefinitely extended, if the clause, "the trees to be got away as soon as possible," be enlarged so as to cover a possible period of eight years.

I think that the plaintiff had a lien on the property for the unpaid purchase money, and that the agreement being registered, any person dealing with the property subsequently took subject to the position of the parties under this agreement. It is true that, as in *McCarthy v. Oliver (a)*, leave may be given to cut, or there may be assent, which license on the part of the owner would preclude a recovery in respect of the trees cut. In *Wyatt v. The Bank of Toronto (b)*, it was held that under the circumstances of that case there was a complete parting with the possession of the trees and fallen timber, and a vesting of an unequivocal possession in the purchaser. But where the exceptional circumstances do not exist, it seems clear that the Court

1880.
Summers
v.
Cook.

Judgment.

(a) 14 U. C. C. P. 290.

(b) 8 U. C. C. P. 104.

1880.
Summers
v.
Cook.

can not only restrain the cutting, but also prevent the removal of timber wrongfully cut. In an anonymous case in 1 Ves. Jun. 93, Lord *Thurlow* said: "I have no doubt about the interference of this Court to prevent waste; the only difficulty I have is, as to what shall be done with the timber cut. Trover might be brought for it; but, as the Registrar says, many orders of this kind have been made, take the order." In *Mitchell v. McGaffey* the injunction went to restrain the removal; and I think the plaintiff is entitled, with costs, to a declaration that she has a lien, and to restrain the cutting and removal until payment.

The defendants deny that the plaintiff has any lien, and seek to shield themselves on this ground. The defendants *Casselman* and *Cook* should therefore pay the costs of the suit, including the costs of this rehearing.

SPRAGGE, C., concurred.

Judgment.

PROUDFOOT, V. C.—It was not attempted to be disputed, in fact it was conceded on the argument, that, if the standing timber were to be considered as chattels or personal estate, the vendor had no implied or equitable lien for the purchase money, but must look to the personal responsibility only of the vendee (*a*).

When trees are not severed from the soil, and the owner of the land dies, they are considered as part of the inheritance itself, and descend to the heir (*b*).

But this is a general rule that yields to the intention of the owner, and a legal severance may be effected, though the trees remain attached to the soil. Thus if the owner grants the trees they are absolutely vested in the grantee; and their character is so effectually changed that they do not pass to the heir of the purchaser, but to his executor or administrator: *Stukely v. Butler* (*c*).

(a) 1 W. & T., Am. note to *Mackreth v. Symons*, ad fin.

(b) *Lifford's Case*, 11 Co. 48 a.

(c) Hob. 173.

Or, if the owner sells the land, and reserves the trees, they are as effectually severed from the land as if they had been actually felled, though they remain annexed to the soil, and they pass to the executors or administrators of the vendor (a).

1880.

Summers
v.
Cook.

When the purchaser of the trees afterwards buys the inheritance, the character of the trees is restored; they become reunited to the property, and descend to the heir.

But if the grant of the trees be made to a lessee for years of the land on which they stand, they remain chattels, the lessee has an absolute property in them, which passes to his executors or administrators.

In complete conformity with these cases, Lord *Hardwicke* treated a sale of standing timber as a sale of chattels, although the purchaser had eight years to remove them: *Buxton v. Lister* (b).

And I notice also, that in *Stukely v. Butler*, *supra*, the grantee of the trees not only had five years to remove them, but had also the right to make some pits on the land, and to convert the trees into timber where they stood.

Judgment.

These cases, and many others that might be cited, seem to establish that where the trees are dealt with separately from the land, they will be considered as chattels, as the purchasers plainly intended they should be.

This question is entirely distinct from another, much relied on in the argument, viz., whether the trees were not so connected with the soil as to be an interest in land, and so require a writing to evidence the contract under the Statute of Frauds. But it does not seem at all clear that a sale of trees is such an interest in land as requires a writing for a contract for the sale of them. *Smith v. Surman* (c), was the case of a sale of

(a) *Herlakenden's Case*, 4 Co. 63, 6.

(b) 3 Atk. 383.

(c) 9 B. & C. 561.

1880.
Summers
v.
Cook.

standing timber at so much a foot, which the proprietor had begun to cut down, and the purchaser bought them after two had been felled; the seller was to cut the remainder. This was held to be a sale of chattels. This is said to be an exception from the general rule, and to depend on the fact that the trees were to be immediately felled, and that the vendor was to fell them. But in *Marshall v. Green* (a), it was held that a purchase of standing timber, although not to be removed for a month, was likewise a sale of chattels. The true rule deducible from these cases would seem to be, that if the trees were purchased for the timber as they stood, and not with the intention of allowing them to increase in size, and become more valuable from remaining on the soil, that they are to be considered chattels. If the lapse of a month does not determine their character, where is the limit? Why should not the same rule apply as in *Stukely v. Butler*, and in *Buxton v. Lister*, that the lapse of even five or eight years should not decide it, but the intention of the parties? There is no difficulty in distinguishing such a case from one of the sale of a young and growing plantation, where the trees were to be allowed to grow until they became merchantable.

Judgment.

The case in our own Court of *Mitchell v. McGaffey* (b), was decided upon the authority of *Scorell v. Boxall* (c), and *Rhodes v. Baker* (d), which were supposed to establish a rule at variance with *Buxton v. Lister*, but the more recent cases I have referred to seem to be bringing back the law to its original position, and to consider the subject of contract to be what it was intended by the parties to be, a chattel. As between the heir and executor the trees retain the character of realty, in the absence of any intention to give them a different character; but when they are sold, to be used in the only way they can be used, as chattels, they

(a) L. R. 1 C. P. Div. 35.

(b) 6 Gr. 361.

(c) 1 Y. & J. 396.

(d) 1 Ir. C. L. R. 488.

become chattels, and pass, not to the heir, but to the executor. Or, as it is stated in *Sheppard's Touchstone*, p. 471: "If one be seized in fee simple of ground whereon trees do grow, and he sell me these trees for money, and afterwards I die before they be cut, in this case my executor or administrator shall have and may cut them" (a).

1880.

Summers
v.
Cook.

It seems to have been assumed in *Mitchell v. McGaffey* that the right to specific performance carried with it the right to a lien for the purchase money. But I apprehend this states the law too broadly. There are many instances in which specific performance may be had of an agreement for the sale of chattels: such as a statue, a picture, the Pusey horn, a silver tobacco-box and other articles having a peculiar value; but it was never contended that in such cases there was an implied lien for the price.

It was further assumed in that case that the lien existed. The question was not discussed; both parties appear to have admitted it, so that it cannot be referred to as the deliberate opinion of the Court after argument. The only matter really discussed was, whether the lien had been waived or not, assuming that it had existed.

Judgment.

If the subject of sale has by the act of the parties become a chattel it is of no importance that it may still be so attached to the soil as to be affected by the Statute of Frauds. This only regulates the evidence of the contract, it does not change the nature of the subject. If the subject be in fact attached to the soil, a writing may be required, though for all other legal purposes, of devolution or contract, it may have the character of personal estate.

The decree made on the rehearing of the cause declared, "that the plaintiff has a lien on the timber, mentioned in the agreement for purchase in the bill of complaint referred to, now standing, lying, or being on the lands and premises, in the said bill mentioned, for the amount of the plaintiff's claim for principal, interest, and costs, here-

Decree.

(a) 1 Thom. Co Litt. 200, Vide 11 Co. 50.

1880. inafter mentioned; and doth order and decree the same accordingly:
Summers
v.
Cook.
(3), and this court having caused an account to be taken of the amount due the plaintiff under the said agreement, doth find that there is due for principal money the sum of two hundred and thirty-six dollars, and for interest thereon, up to the date of this decree, the sum of twenty-one dollars and forty-seven cents, and having caused the plaintiff's costs of this suit, including the costs of this rehearing, to be taxed, doth find the same amount to the sum of four hundred and twenty-one dollars and ninety cents, which several sums being added together make in all the sum of six hundred and seventy-nine dollars and thirty-seven cents. (4). And this Court doth further order and decree that an injunction be awarded to the plaintiff, restraining the defendants *John Larkin Cook* and *Zachariah Casselman*, their servants, workmen, and agents, from cutting and removing the said timber standing, growing, and being on the said lands and premises, and from removing that already cut down, and now lying on the said lands, until payment of the said sum of six hundred and seventy-nine dollars and thirty-seven cents, and interest on the said principal money from the date thereof until payment, and that upon payment thereof the defendants are to be at liberty within one year from the date of this decree to cut and remove all the said timber, and that the plaintiff do release and discharge her said lien. (5). And in case the amount so found due to the plaintiff as aforesaid, together with subsequent interest on the said principal money until payment, be not paid to the plaintiff on or before the 21st day of May next, this Court doth further order and decree that it be referred to the Master of this Court at Barrie, to inquire and state what is the value of the timber removed from off the lands in question, by the defendants *Cook* and *Casselman*, or either of them, since the filing of the bill of complaint in this cause, and to tax to the plaintiff her subsequent costs of this suit, in case anything shall be found due from the said defendants *John Larkin Cook* and *Zachariah Casselman*, or either of them. (6). And this Court doth further order and decree that the said defendants *John Larkin Cook* and *Zachariah Casselman*, do forthwith pay to the said plaintiff the amount which shall be found due from them in respect of the said timber so cut and removed by them as aforesaid, together with the plaintiff's costs and subsequent costs of this suit, (unless the same costs shall have been sooner paid) forthwith after the confirmation of the said master's report. But in the event of nothing being found due from the said defendants *John Larkin Cook* and *Zachariah Casselman* in respect of the timber removed by them from off the said lands since the filing of the said bill, this Court doth reserve the question of the costs of such reference until after the said Master shall have made his report. (7). And this Court doth further order and decree that the defendants *John Larkin Cook* and *Zachariah Casselman* do forthwith pay to the plaintiff the sum of four hundred and twenty-one dollars and ninety cents, being her taxed costs as aforesaid."

1880.

LITTLE V. BRUNKER.

Redemption—Trifling balance due on mortgage—Costs—Appeal from Master—Conflicting evidence.

In proceeding under a consent decree to redeem, the defendant being in the position of a mortgagee brought in an account claiming \$905 to be due, while the Master found the balance to be only \$1.32. *Held*, that as the defendant had advanced his claim honestly, and under a reasonable belief that the sum claimed was justly due, he was entitled, notwithstanding the insignificant sum remaining unpaid, to the benefit of the rule that a mortgagor coming to redeem, is liable for the costs of suit where a balance is found in favour of the defendant.

On a question of rent, there was a conflict of evidence as to the amount thereof. On appeal from the Master's finding: *Held*, that the witnesses having been examined before the Master, he was a better judge than the Court as to the weight to be given to the testimony of the respective witnesses; and the question as to the proper sum to be allowed for rent, was one with which the Master was quite as competent to deal, as the Court could be.

Appeal from the report of the Master at Lindsay, and hearing on further directions.

Mr. G. H. Watson for the plaintiff, who appeals.

Mr. Hudspeth, contra.

The facts are fully stated in the judgment.

SPRAGGE, C.—The cause came on by way of appeal Feb. 18th. from the Master at Lindsay, and for hearing on further directions and as to the question of costs.

The decree was pronounced upon a bill to redeem by consent of parties. Judgment.

The defendant has been in possession, has made improvements, and is charged with occupation rent.

The decree declares the defendant entitled to a lien on mortgage for moneys advanced by him, as in the bill mentioned, the defendant to be charged with occupation rent, and to have all proper credits allowed

1880.

Little
v.
Brunker.

to a mortgagee in possession, including all moneys or advances made by the defendant to said *John O'Neil Little* during said period. The advances mentioned in the bill are: advance of \$150 to pay off *Barr*, who held a conveyance of the land from *John O'Neil Little*; advances made under agreement that defendant should make certain improvements in completing the tavern; and that he should hold the premises as well for securing repayment thereof, as of advances to pay *Barr*; and another advance mentioned in the bill consists of small sums paid by the defendant to *Little* from time to time.

The decree treats all these as charges upon the lands, as it is upon payment of all that plaintiff is declared entitled to redeem.

Jndgment. The Master has allowed to the defendant interest upon these small advances; and this is objected to. The advances consist for the most part of cash. The allowance of interest in such a case by a jury would certainly not be disturbed. I think a jury would be told in such a case that it was in their discretion to allow interest if they thought fit; and this being, as treated by the decree, an advance upon the security of land conveyed to the defendant, and held by him as a mortgage security, is an additional reason for the allowance of interest. I disallow the appeal on this ground.

The Master has charged the defendant with occupation rent, for the first two years, at the rate of \$120 a year, which is not objected to, and for the rest of his period of occupation at the rate of \$175 a year, which is objected to as too low. There was conflicting evidence upon this. If I were to look only at the *number* of witnesses on each side I should probably think the Master wrong; but the witnesses were examined before the Master himself, and he was a better judge than I can be of the weight due to their respective evidence; and the question before him, what was a proper sum to be allowed for occupation rent under the circum-

stances, was one with which he was quite as competent to deal as I can be. If I were to overrule his finding upon this point I should probably be wrong myself.

1881.

Little
v.
Brunker.

The cause comes before me on further directions and costs, as well as on appeal from the Master's finding, and the principal question is as to the costs. By his account brought into the Master's office the defendant claimed a balance of \$905. He charged himself with occupation rent \$600 only. The Master has allowed against him \$881. The principal deductions from his side of the account are in respect of his improvements, and of payments made by him during his occupation. He carried into the Master's office an account in detail for moneys paid for work and materials, and for insurance and taxes. Under the decree he was entitled to make his charge in that shape, but for some reason, it is said at the suggestion of his own solicitor, (who could, I think, hardly have calculated the consequences,) this was changed to an account of the then present value of the improvements to the premises as they stood. The account in detail amounted to \$1,002. The account upon estimate of value was \$619; and from this several deductions were made, among them \$120 for plaintiff's own work on building, which reduced the allowance to \$443. One cannot say how many items in the detailed account would have been allowed, or how many disallowed; but it is manifest that the account being taken upon the footing that it was, was one less favourable than he was entitled to. The account seems, moreover, to have been taken against him with some strictness, for all the items of payments for insurance on the buildings, \$121, are disallowed, and about \$60 paid for taxes are also disallowed. The result is that the balance due to the defendant is reduced to the insignificant sum of \$1.32;

Judgment.

The plaintiff now asks for costs of suit against the defendant, and says that his conduct has been vexatious and oppressive. I find no evidence of this, and I have

1881.

Little
v.
Brunker.

gone into some particulars of the account to shew that he has been unfortunate rather than vexatious or oppressive. They shew that he has been a considerable loser by his dealing with the plaintiff's father, and with the dilapidated building which, at the father's request, he made fit for the purpose for which it had been intended, and was then used. Charging the defendant with the plaintiff's costs is out of the question. The only question is, whether the plaintiff should be allowed to redeem except upon payment of costs. The general rule is, that a mortgagor coming to redeem pays costs, when, upon taking the accounts, a balance is found in favour of the mortgagee. Lord *Redesdale*, in *Loftus v. Swift (a)*, states the rule thus: "A mortgagee is always considered as entitled to costs, unless there be something of positive misconduct. Merely extending his claim, beyond what the Court finally decides that he is entitled to, is no ground for refusing him his costs." I refer also to the late case of *Cotterell v.*

Judgment.

Stratton (b), in appeal.

The very small balance found in his favour has led me to pause. But the particulars that I have given shew that he might well believe that a considerable balance was due to him, *e. g.* the money paid for insurance he might assume would be allowed to him, also the money paid for taxes. I am not saying that these items were not properly disallowed, but they were actual expenditure reasonably made, and almost any man not a lawyer would take it for granted that he would be reimbursed. Then the footing upon which the accounts were taken was unfavourable to the defendant, and certainly very favourable to the plaintiff.

The defendant has the good fortune to have a balance, though a very small one, found in his favour. It enables me to apply the rule as to costs. If the balance had been the other way, I could not have given

(a) 2 S. & L. 657.

(b) L. R. 8 Chy. 295.

him his costs. As it is, I can apply the rule in this case, and, under the circumstances, it is just that it should be applied.

The result is, that the appeal from the Master is overruled, with costs; and the plaintiff redeems on payment of the balance found due, and costs.

1881.

Little
v.
Brunker.

RE THE TORONTO HARBOUR COMMISSIONERS.

Trustees—Commissioners of government works—Compensation to trustees—Conflict of interest with duty.

Held, following the case of *The Commissioners of the Cobourg Town Trust*, ante vol. xxiii., p. 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services; and this whether the harbour belonged to the Dominion or the Provincial Government, as in the event of it being found to belong to the Dominion it must be assumed that the Dominion Government intended the commissioners to be subject to the law of the province in which the trust was to be administered.

The sum to be allowed should be such as would be a reasonable compensation for the services rendered, and at the same time such a moderate amount as would not be an inducement to members of the city council or of the board of trade, or others, to seek the office for the sake of the emolument.

The duties of the office being shewn to be not at all onerous, an allowance of \$50 a year was named as sufficient to obtain the services of the right class of men to discharge them.

The rule that a trustee must not have a personal interest in conflict with his duty as such trustee, applies as well to public as to private trusts. Therefore, where one of the commissioners of a harbour had large landed interests adjacent to and upon one part of it, and was interested in having that portion of the harbour improved, the Court, [SPRAGGE, C.,] on directing an allowance to be made to the commissioners for their services, expressly excepted the commissioner so interested from participating therein, and this although he had not applied for any compensation and had at the Board of Commissioners opposed any such allowance being made.

1881. This was a petition presented by several of the Commissioners of the Toronto Harbour to have an allowance fixed as compensation for their services in discharging the duties of such trust.

Re Toronto
Harbour
Commissioners.

Mr. *Boyd*, Q. C., in support of the petition.
Mr. *Foy* and Mr. *Tupper*, contra.

The facts are fully stated in the judgment.

SPRAGGE, C.—This case is not distinguishable in principle from the case of *The Commissioners of the Cobourg Town Trust* (a), decided by my brother *Proudfoot*. I have perused the report of that case, and find that almost every paragraph of the judgment applies to the case before me.

Judgment. The only argument advanced in this case that was not advanced in the case in 22 Grant, where the case was argued by Mr. *Boyd*, for the Commissioners, and by the present Chief Justice of Ontario against the allowance prayed for, is one now advanced by Mr. *Foy*, viz., that the Toronto harbour is, under the British North America Act, the property of the Dominion of Canada, and that it was for the Crown, if any compensation was to be made to the commissioners, to fix the amount; and *Leprohon v. Ottawa* (b) is cited for the position.

In the Cobourg case the "harbour, wharf, piers, and appurtenances," were part of the subjects of the trust. The case was therefore open to the same contention, so far, at any rate, as they were concerned; and I apprehend that, assuming an argument which I might think entitled to be considered as of weight had been overlooked by counsel and by the Court (which I think unlikely), it would not be a sufficient reason for not following the decision.

(a) 22 Gr. 377.

(b) 2 App. R. 522.

Mr. *Boyd* contends, at any rate, that the Toronto harbour is not the property of the Dominion of Canada; that it is only such public works enumerated in schedule 3 as were the property of the Province, that were made the property of the Dominion; and that the Toronto harbour, like the Cobourg harbour, was and is vested in commissioners. I do not think it necessary, however, to decide that point, for the judgment in the Cobourg case decides that the trust is not a purely honorary one, and that the commissioners are entitled to be compensated for their services. Then why is it that the Act to provide for allowances to trustees does not apply to such a case, even if Mr. *Foy* be right as to the property in the harbour being in the Dominion? The Crown, as represented by the Dominion Government, has not fixed the amount of compensation, and therefore its being fixed by another authority is no interference with any Act of the Dominion Government, and the case of *Leprohon v. Ottawa* does not apply.

1881.

Re Toronto
Harbour
Commissioners.

Judgment.

Then, further, we find in the Toronto Harbour Act, 13 & 14 Vict. ch. 80, provision made for the application of the tolls and revenues to be received by the Commissioners. "First, to the payment of all reasonable expenses of collecting the same and of managing the said harbour and works, and keeping the same in efficient repair." These words in a will or other private instrument creating a trust involving the duty of management of the subject of the trust, would indicate an intention on the part of the creator of the trust that the trustee should, as the law now stands, receive compensation for his services, as part of the reasonable expenses of managing the trust estate. The Dominion Government, Legislative or Executive, which must, of course, be assumed to be cognizant of the law of this Province in relation to compensation to trustees, has not thought fit to interpose its authority—assuming that it has authority—but has left the question of

1881.
 Re Toronto
 Harbour
 Commis-
 sioners.

compensation to be governed by the law of the Province in which the trust is to be executed. If, therefore, the harbour of Toronto be Dominion property, as contended by Mr. *Foy*, its being so is not, in my opinion, against the Trustee Compensation Act applying to the case.

Then, as to the amount of compensation. It should be such a sum as would be a reasonable compensation for services rendered, and at the same time such a moderate sum as would not be an inducement to members of the city council or the board of trade, or others, to seek the office for the sake of emolument. The evidence before me in relation to the duties of the commissioners does not shew their duties to be at all onerous. The right class of men for the discharge of those duties would, I apprehend, deem themselves sufficiently compensated by an allowance of \$50 a year each. This allowance is a moderate one, but it takes the case out of the range of gratuitous service, and the duties are of such a nature as not necessarily to interfere with a man's ordinary business avocations.

Judgment

I ought not to part with this case without noticing a circumstance that has been brought under my observation upon a perusal of the evidence. One of the commissioners, Mr. *Worts*, who has been appointed by the board of trade, as he states in his affidavit, for upwards of twenty years, and chairman of the board for fourteen successive years, and who states also that during that period the larger portion of the business of the commissioners has devolved upon and been performed by him, states in his examination :—

“I am largely interested in property at the east end of the harbour, and a large amount of shipping goes there. I never heard that any complaint was made by Alderman *Baldwin*, or any discussion that the eastern portion of the harbour got more than its share of looking after. * * I never heard that any statement was made about the east end of the harbour get-

ting more than its share, and I know I sat as harbour commissioner for eight or nine years before anything was done in the neighbourhood of the Don. The accounts will shew everything that has been spent in the east end of the harbour for the ten years ending in 1877. I understood from the deputy harbour master that between \$48,000 and \$49,000 has been spent there. I think myself there has been that much spent there altogether."

1881.
The Toronto
Harbour
Commissioners.

It is a principle acted upon invariably by Courts of Equity that a man cannot be allowed to place himself in a position in which his interest may be in conflict with his duty. It is too clear to admit of question that the commissioner to whom I refer has allowed himself to be placed in that position. It has been his interest to have the moneys of the trust largely, and perhaps to an undue amount, expended in that part of the harbour where, as he says himself, he is largely interested in property; it has been his duty to see that only a due and proper portion of the moneys of the trust should be expended in that part of the harbour. The evidence shews that it has been suggested at the board that more than a due proportion of trust moneys has been expended there. This may or may not have been the case. The suggestion that it has been so may have been entirely erroneous. I may assume that it is so; but its being so does not affect the principle: the commissioner has, nevertheless, occupied a false position. Judgment.

I do not assume for a moment that the commissioner has abused his position by using vote or influence in procuring an undue expenditure of money to benefit himself, or that there has been, in fact, an undue expenditure of trust funds that has enured to his benefit. The principle to which I have adverted stands clear of all such considerations. The position is one which it has been an error, I will say a mistake in him to occupy, though he may have exercised the

1881. greatest self-abnegation, and have never allowed his duty to be at all biased by self-interest.

*Re Toronto
Harbour
Commissioners.*

Judgment.

It has not been contended by counsel for either side that Mr. *Worts* is not entitled to receive compensation if the other commissioners are so entitled; but his position being judicially before me, and it being the rule of the Court that a person in his position shall receive no profit from his position, I must declare him not so entitled. At the same time it is due to him to say, that he is one of those who have not sought pecuniary compensation for their services as commissioners, and he has on the contrary, in his place at the Board, opposed the allowance of such compensation.

I follow the *Cobourg* case in allowing the costs of the application out of the fund.

CAMPION V. BRACKENRIDGE.

1881.

Sale under power—Agreement to advance money—Pleading—Demurrer.

In a bill filed by a mortgagor against his son, a bidder at the sale by another of the defendants, a *Loan Company* to which bill the company and one *B.* were also defendants, it was alleged that it had been agreed between the son and *B.* that in consideration of the son's securing to *B.* a debt of the plaintiff, *B.* would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land, which he accordingly did; that in consequence of *B.*'s refusal to make the promised advance, the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding, and that *B.* afterwards privately bought the land at a great undervalue to the loss of the plaintiff;

Held, on demurrer, that the bill sufficiently, though inartificially, alleged that by reason of *B.*'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale, and profited thereby to the loss and damage of the plaintiff.

This was a bill by *David Campion* against *John Brackenridge*, *Edmund Campion*, and *The Ontario Savings and Investment Society*, setting forth that prior to the 14th of February, 1870, the plaintiff was owner in fee of 130 acres of land in the township of Colborne, subject to a mortgage held by the defendants *The Ontario Savings and Investment Society*, upon which there was due for principal, interest, and costs, the sum of about \$3,900; that default having been made in payment, the defendants the society, gave the notices required by the mortgage before proceeding to a sale, and offered the lands for sale by public auction at the town of Goderich, on the 14th of February, aforesaid, when the same were knocked down to the defendant *Edward Campion*, son of the plaintiff, who was the highest bidder, for the sum of \$4,050; that prior to the sale an agreement had been entered into between the defendants *Campion* and *Brackenridge*, under which, in consideration of *Campion* giving *Brackenridge* his promissory note for \$48, being an amount for which the plaintiff was indebted at the time to *Brackenridge*, it was agreed that if the lands should not

1881. realize the sum of \$5000 at the proposed sale, *Campion* should become the purchaser, and *Brackenridge* would advance the necessary deposit of ten per cent. upon the amount at which they should be bid in, and that a new loan was to be effected in order to pay off the *Savings Society*; that upon *Campion* becoming the purchaser at the sale, he applied to *Brackenridge* for the ten per cent. deposit, which was refused, and he not being able to furnish it himself, the *Savings Society* declined to carry out the sale; and the same evening they made a private sale of the lands to *Brackenridge*, for the sum of \$3,800, without the knowledge of the plaintiff or defendant *Campion*, notwithstanding they had notice of the agreement between *Brackenridge* and *Campion*.

The bill insisted that there was a number of persons present at the auction, prepared to bid for the lands at a price considerably over the amount realized, but they refrained from bidding against the defendant *Campion*, believing that he was there for the purpose of buying the lands in the interest of the plaintiff or his family.

The bill also charged that by reason of the agreement between the defendants *Brackenridge* and *Campion*, and the bidding by the defendant *Campion*, a sale of the lands, at a fair price to a *bond fide* purchaser was prevented, and that the private sale to *Brackenridge* for \$3,800 was greatly below the cash value, and that a much larger sum would have been realized at a fair public sale.

The bill further alleged that the defendant company were well aware of the agreement between the defendants *Brackenridge* and *Campion*, before the arrangement to sell to *Brackenridge*; notwithstanding which the company threatened and intended to carry out the contract with *Brackenridge*, and prayed an injunction to restrain the carrying out thereof, and that the lands might again be offered for sale by auction, and for further relief.

The defendant *Brackenridge* demurred for want of equity.

Mr. *W. Cassels*, in support of the demurrer, contended that even if every statement set forth in the bill were true, still it was not sufficient to set aside the sale that had been effected, as the plaintiff here had clearly nothing to do with the alleged agreement, and the father could not file a bill in respect of what transpired between *Brackenridge* and the son, the father having been no party to the agreement; and the agreement as alleged by the plaintiff shews that the son had determined to purchase, and was about to bid for the property in his own interest, not for his father. In any event the sale could not be set aside as against the vendors, who were not parties in any way to the alleged agreement.

1881.

Campion
v.
Bracken-
ridge.

Mr. *Moss*, contra. The statements of the bill clearly evince a determination on the part of the defendant to act in such a manner as to obtain a benefit for himself. In any event the defendant *Campion* was to become the purchaser if the biddings did not reach \$5,000, and the father and son relied upon the promise of *Bracken-* ridge to make the agreed advance, and but for such promise they could have made the necessary arrangement with other parties. The company it is admitted could under their mortgage sell by private sale, but here the whole transaction looks as if the course pursued had been taken to remove all other competitors out of the way. *Watson v. James (a)*, *Brown v. Fisher (b)*, *Galton v. Emuss (c)*, *Re Carew (d)*, *Shelly v. Nash (e)*, were referred to and commented on by counsel.

Argument.

SPRAGGE, C.—The demurrer is by the defendant, Feb. 18th. *Brackenridge*. The defendant *Edmund Campion* was not the agent of his father, the plaintiff, in the alleged agreement between him and *Brackenridge*. The two entered into an agreement as to what each should do

(a) 19 Gr. 355.

(c) 1 Coll. 243.

(e) 3 Madd. 232.

(b) 9 Gr. 423.

(d) 26 Beav. 187.

1881.
Campion
v.
Bracken-
ridge.

in regard to an approaching sale by auction of the plaintiff's land; and, agency being out of the case, the plaintiff is not entitled to avail himself of the agreement between the parties. The question then arises, whether the acting upon that agreement by either of the parties operated to the prejudice of the plaintiff at the sale. It would be too broad a proposition to lay down, that in all cases where it does so operate the plaintiff is entitled to relief. It is settled law that an agreement between two persons, both of whom are desirous of purchasing the same estate, that one shall abstain from bidding (receiving therefor a valuable consideration), and leaving the field open to the other, is a lawful agreement, and the agreed consideration may be enforced. This was the case in *Galton v. Emuss* (a); and in *Re Carew's Estate* (b), the Court refused to set aside a sale, made under the direction of the Court, where, if the two parties to such an agreement had bid independently, a much larger price would have been obtained.

Judgment.

This is a different case. The allegation is, that *Edmund Campion* agreed to give to *Brackenridge* his promissory note for \$48, to which amount the plaintiff was *Brackenridge's* debtor, on condition that the land should be bought in by *Edmund Campion*, and a new loan be obtained to pay off the mortgage to the defendants, the Loan Society, unless the land should bring at auction as much as \$5,000; and that in the event of the land being bought in by *Edmund Campion*, "as proposed," *Brackenridge* should advance the necessary deposit of ten per cent. on the purchase money.

It is alleged that *Edmund Campion* did, pursuant to the said agreement, attend at the sale and make several bids; and that the land was knocked down to him for \$4,050; that *Brackenridge* then refused to advance the deposit, and that *Edmund Campion*

(a) 1 Coll. 243.

(b) 26 Bea. 187.

having relied on the agreement of *Brackenridge* to supply the same, was unable to pay it; that the Loan Society then refused to carry out the sale, and sold the same evening to *Brackenridge* for \$3,800. Then follows this allegation, paragraph the 8th: "There were present at the said sale a number of persons prepared to bid, and several who would have bid the said lands up to a sum considerably over the said sum of four thousand and fifty dollars, but who declined to bid against the said defendant, *Edmund Campion*, knowing that he was plaintiff's son, and believing that he was buying, or proposing to buy, the said lands in the interest of the plaintiff or his family."

1881.

Campion
v.
Bracken-
ridge.

It is suggested that, for all that appears on the bill, *Edmund Campion* was to bid at the sale on his own behalf; and purchase, if he purchased, for himself. The words used are "bought in" and "bid in," which imply a purchase for the owner.

The allegations are not, by any means, so definite as they might have been; but I think it is, inartificially certainly, but still sufficiently, alleged, that *Edmund Campion* attended and bid at the sale by reason, and in consequence of, the agreement by *Brackenridge* to advance the ten per cent. deposit on sale; that not having means of his own to pay such deposit, he would not have attended and bid but for this agreement of *Brackenridge* to supply it, and that his so attending prejudiced the sale in the way pointed out in the 8th paragraph. It amounts to this: that his agreement with *Edmund Campion*, and *Edmund Campion's* acting upon it, were the means of deterring persons from bidding, who came to bid; and that his refusal to fulfil his agreement made the sale abortive; and that he availed himself of what he had done, and what he had omitted to do, to obtain the land for himself at a great undervalue, and to the great prejudice and loss of the plaintiff.

Judgment.

There is room to contend that there was design in all

1881. this; that the whole was a scheme to obtain the land for himself at an undervalue, in which case there would be the element of fraudulent intent. I speak, of course, only from the allegations in the bill.

Camplin
v.
Bracken-
ridge.

This case differs materially from *Brown v. Fisher* (a), inasmuch as in that case it was not through any wrong, or indeed any act of the purchaser, that the sale was prejudiced, if it was prejudiced at all, and that it was prejudiced at all appeared very doubtful to the late learned Chancellor, before whom the case was heard.

The demurrer is overruled with costs.

(a) 9 Gr. 423.

1881.

STAMMERS V. O'DONOHUE.

Specific performance—Signature of parties to contract—False statements as to state of property—Compensation.

It is not necessary that the name of a party to a contract for the sale of property should be actually signed thereto; it is sufficient if the alleged contract is in writing and is subsequently recognized by the party thereto sought to be charged in any writing signed by him or his agent. Therefore, where property was sold by auction and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of the sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself,) wrote "Re S.'s purchase we would like to have it closed," and referring to certain representations made in advertisements of the sale, "they were not made any part of the contract of sale * * * Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter, we will prepare it at once and send you draft for approval," and on a subsequent occasion, "Re S.'s purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote, "I shall take immediate steps to enforce the contract."

Held, that there was sufficient in writing signed by the party to be charged to take the case out of the Statute of Frauds; and that the purchaser was entitled to a specific performance of the agreement for sale.

Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of land he is about to offer for sale, still he will not be permitted to make direct misstatements and misrepresentations as to matters of fact which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of property about to be sold described it as being "a farm of 81½ acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when in fact there was not any clearing or fencing made upon the premises: The Court [BLAKE, V.C.] in pronouncing a decree for specific performance at the instance of the purchaser, directed a reference to the master to make an allowance in respect of the matters misrepresented, and ordered the vendor to pay the costs of the suit.

This was a bill by *Samuel James Stammers*, against *John O'Donohue*, setting forth that defendant being, or pretending to be owner in fee of certain lands in the

1881. township of West Gwillimbury, containing 88 acres, less 6 $\frac{1}{4}$ acres sold for taxes, offered the same for sale by public auction in the city of Toronto, on the 15th of May, 1880, when plaintiff became and was declared the purchaser thereof at \$5 per acre; whereupon the usual agreement of sale was signed by the plaintiff and the defendant, and the plaintiff paid \$46.62 as the first payment on his said purchase in accordance with the conditions of sale, the balance being payable as follows: such other sum as, with such payment, would make up one-third of the purchase money within fifteen days after the sale, and the remaining two-thirds in three years, secured by mortgage bearing interest at seven per cent.

Stammers
v.
O'Donohoe.

The bill further stated, that upon visiting the property the plaintiff discovered that the statement in the advertisement as to clearing and fencing on the property was entirely erroneous, there being in fact neither made upon the property; and prayed specific performance of the contract for sale, with compensation in respect of these matters.

Statement.

The defendant answered the bill, and the cause came on for hearing at the Autumn sittings of 1880, in Toronto.

Mr. *J. Bain* for plaintiff.

Mr. *Haverson* for the defendant.

The defence principally relied on was that under the Statute of Frauds, on the ground that there was not any note or memorandum of agreement signed by the party here sought to be charged.

The cases cited appear in the judgment.

Jan. 11th; BLAKE, V.C.—The memorandum signed in the auction room was not signed by the vendor nor by the auctioneer on his behalf. This memorandum or the

conditions did not specify who the vendor was. On 1881. the back of the papers appear the words, written by the auctioneer: "*O'Donohoe & Haverson*. Property near Newmarket; 81½ acres. *S. J. Stammers*. \$5.00 \$406.25." Although it is sufficiently evident that the land referred to here is that mentioned in the memorandum there is nothing to shew that "*O'Donohoe & Haverson*" are solicitors, agents, vendors, or otherwise interested in the premises. There is not, therefore, a memorandum in writing sufficient within the Statute of Frauds. It is said, however, that the correspondence, subsequent to this date, supplies what is wanting in this respect. It was proved that the defendant at the time of the sale owned the land, and that the letters signed by the defendant's solicitors were written by him: one on the 7th of June, 1880, contains these words: "*Re Stammers Purchase*. We would like to close this." In reply to letters written on the 14th and 18th of June by the plaintiff's solicitor to the defendant's solicitors in regard to the *O'Donohoe* and *Stammers* sale, the defendant writes on the latter date: * * "They were not made any part of the contract of sale. * * Have the goodness to let us know whether the vendee will pay cash or give the mortgage. If the latter, we will prepare it at once, and send you draft for approval." And on the 21st of June: "*Re Stammers Purchase*. Herewith please receive deed for approval." Again, on the 29th June: "I shall take immediate steps to enforce the contract." signed by the defendant alone. Again, on the 22nd of July: "*Re Stammers Purchase*. * * We must get the sale closed without further delay." On the 10th of August, 1880: "*Re Stammers*. Your letters indicate that your client would rather not carry out his contract. We will take \$150 damages, and rescind the contract." If there were several sales, or if the letters were not signed by the defendant, there would have been difficulties in the way of the plaintiff hard

Stammers
v.
O'Donohoe.

Judgment.

1881.
Stammers
v.
O'Donohoe.

to overcome; but where there was, as here, but the one agreement, and this sufficiently binds the purchaser; and the vendor, under his own hand, expressly ratifies what is done, and adopts it, approves of it, in writing refers to it as the "*Stammers* purchase," which he "would like to close," as "the contract of sale"; in a letter, sends a deed for approval in fulfilment of the *Stammers* purchase, and threatens "to take steps to enforce the contract," the plaintiff is entitled to produce this contract, and it being admitted that there is none other, the requirements of the Statute have been fulfilled, and the plaintiff is entitled to specific performance. I think there was a very distinct written admission that the agreement was made, which, under the authorities, binds as if the defendant had signed the original agreement. In *Jones v. Victoria Graving Dock Co. (a)*, Mr. Justice *Lush*, delivering the judgment of the Court below, says: "To prevent frauds and perjuries, the Act will not allow any other kind of proof than the writing itself—if it be in writing—or a *written* admission that the contract was made; and that it was signed in either case by the party to be charged. But so that this kind of evidence is given, it matters not that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract. * * Secondly, it was objected that the draft, not having been itself signed, could not be connected by parol with the signed statement. This point was one of those argued in the House of Lords, in *Ridgway v. Wharton*, cited in the argument, and conclusively disposed of by the judgment of the House in that case."

I note for reference also the following cases to which I have referred on the several points argued before

(a) L. R. 2 Q. B. Div. 314, 323.

me: *Ridgway v. Wharton* (a), *Gillatley v. White* (b), 1881.
Morgan v. Holford (c), *Child v. Comber* (d), *Warner*
v. Willington (e), *Skelton v. Cole* (f), *Thomas v.*
Dering (g), *Coles v. Trecothick* (h), *Owen v. Thomas* (i),
McMurray v. Spicer (j) *Beer v. London and Paris*
Hotel (k) *Sale v. Lambert* (l), *Potter v. Duffield* (m)
Catling v. King (n), *Williams v. Jordan* (o), *Welford*
v. Beazley (p), *Hood v. Lord Barrington* (q), 1 *Dart*
on Vendors and Purchasers, 202; *Fry on Specific Per-*
formance, 166; *Dobell v. Hutchinson* (r), *Jackson v.*
Lowe (s).

Stammers
v.
O'Donohoe.

By the advertisement this property is said to be
 "a farm, 81½ acres, twenty acres cleared and fenced."
 It was on the faith of this statement that the plaintiff
 purchased. It is true that a vendor is allowed a con-
 siderable amount of latitude in the statements or ex-
 aggerations he may make as to the general qualities
 and capabilities of the land he desires to sell; but
 where, as here, distinct matters of fact are presented
 as inducements to a purchaser, who is resident many
 miles from the property, on the faith of which he pur- Judgment.
 chases, then the defendant is bound to make them
 good. See *Crooks v. Davis* (t), and *Canada Perma-*
nent Building Society v. Young (u). There must be
 a decree for Specific Performance, with a reference to
 the Master to make an allowance in respect of the mat-
 ters misrepresented, with costs to the plaintiff. The

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|-----------------------------------------------------|---------------------------|
| (a) 3 De G. M. & G. 677; S. C. 6 H. L. Ca. 238-287. | (c) 1 Sm & Giff. 101. |
| (b) 18 Gr. 1. | (e) 3 Drew. 523. |
| (d) 3 Swa. 423. | (g) 1 Kee. 729. |
| (f) DeG. & J. 587. | (i) 3 M. & K. 353. |
| (h) 9 Ves. 234. | (k) L. R. 20 Eq. 412. |
| (j) L. R. 5 Eq. 527. | (m) L. R. 18 Eq. 4. |
| (l) L. R. 18 Eq. 1. | (o) L. R. 6 Ch. Div. 517. |
| (n) L. R. 5 Ch. Div. 660. | (q) L. R. 6 Eq. 218. |
| (p) 1 Ves. Sen. 7. | (s) 1 Bing. 9. |
| (r) 3 A. & E. 355. | (u) 18 Gr. 566. |
| (t) 6 Gr. 317. | |

1881. damages and costs can be set off against the purchase money, which can also be settled by the Master. The reference is, of course, confined to the two matters, the absence of clearing and fencing.

Stammers
v.
O'Donohoe.

GOODERHAM V. TORONTO & NIPISSING RAILWAY
COMPANY.

FOX V. TORONTO & NIPISSING RAILWAY COMPANY.

Receiver—Passing accounts—Unauthorized payments—Allowance of items paid without authority—Costs.

The Receiver appointed to receive the proceeds of a railway company and apply the same in carrying on the business of the company, paid \$55.97 to the owner of land over which the line ran for the right of way over his lands, he having threatened to obstruct the passage of the company's trains unless paid. On passing his accounts the Master refused to allow the payment in favour of the Receiver, which ruling of the Master was affirmed on appeal, as such payment did not properly come under the head of "working expenses and outgoings" for the road, and which alone the Receiver was authorized to pay; but the Court [SPRAGGE, C.] gave the Receiver liberty to take out an order now for the allowance of this disbursement, on payment of the costs of the appeal—but refused to make such an order in respect of fees paid to the Solicitor of the company for the examination of titles, as there was not any evidence to shew that the payment was such as would have been sanctioned by the Court if applied to in the first instance for permission to pay the same.

APPEAL from the Master's report under the circumstances stated in the judgment.

Mr. MacLennan, Q.C., and Mr. Kingsford for the appeal.

Mr. R. M. Wells, contra.

SPRAGGE, C.—This is an appeal by *Joseph Gray*, 1881.
 receiver, appointed in the above two suits, from the
 disallowance by the Master of two items on the pass-
 ing of his accounts.

Gooderham
 v.
 Toronto &
 Nipissing
 R. W. Co.

Jan. 22nd.

Mr. *Gray* is appointed receiver of "the defendants' railway and undertaking, and of the revenues, issues and profits thereof," and it is ordered that out of the moneys to be received by him as such receiver he shall "provide for the working expenses of the defendants' railway, and other outgoings in respect of the said railway undertaking," and pass his accounts, and pay balances into Court. All, therefore, that he is authorized to pay out of the moneys he receives is the working expenses and other outgoings. The first item disallowed, and as the receiver objects improperly disallowed, is a small one, a sum of \$55.97, being a sum paid by the receiver as due to one *Armstrong*, an owner of land, for right of way. A telegram was received by the receiver informing him that the owner was about obstructing the passage of trains, by way of coercing the company into payment. Such obstruction would of course be an unlawful act; and the threat of the owner might or might not have been carried out; still, the amount being small, and the owner having a right in this Court, paramount to that of bond holders or other creditors, in virtue of his lien for unpaid purchase money, the receiver might well be advised that he might under the circumstances be excused if he paid the money (there being no other fund out of which the payment could be made), and apply to the Court to sanction the payment. He did not apply for the sanction of the Court, but charged it in his account as a proper payment. In my opinion it clearly does not come within working expenses of the road, nor within the term "outgoings," which can only mean in this connection current expenditure or outlay. To give it a wider meaning would authorize payments such as were held by my brother *Proudfoot*

Judgment

1881. in this case not to have been authorized by the terms of the receiver's appointment.

Gooderham
v.
Toronto &
Nipissing
R. W. Co.

I think then that in strictness the payment was *ultra vires*; but at the same time, looking at the circumstances under which it was made, and the position and right of the land-owner, it was unreasonable to object to it, and if upon the objection being allowed, the receiver had simply applied to the Court to sanction the payment I should, if, the application had come before me, have granted the application. What he does is to appeal—in that I think he cannot succeed—or, in the alternative, for an allowance by the Court of this and another disputed item, or for such other order as to the Court may seem meet. Coming before me in this shape I may properly sanction the payment, while I think the Master was right in disallowing it. I will deal with the costs presently.

Judgment.

The other subject of appeal is the disallowance by the Master of a sum of \$774 paid by the receiver to a solicitor of the defendants for professional services rendered after the date of the appointment of the receiver, in the examining of titles to 129 parcels of land on the line of the Lake Simcoe Junction Railway. I find among the papers a certificate to the above effect made by the solicitor, and he adds that the work was necessary to be done before the Lake Simcoe Junction Road could be accepted by the defendants' company under the agreement between the two companies, and that under the agreement it could only be charged against the defendant company.

Taking all this to be strictly correct, as I have no reason to doubt that it is, the question remains whether it was a payment which the receiver had authority to make. In my opinion this question cannot be answered in the affirmative. The services for which the payment was made were certainly not working expenses of the road, nor were they "outgoings," in the sense of being current expenditure or outlay. It

would be stretching these terms altogether beyond their legitimate meaning, in the connection in which they are used, to hold them to comprehend expenses of such a character as this. The Master was therefore, in my opinion, right in disallowing the payment.

Nor am I able to say upon the material before me that this is a payment which it would be proper for the Court to direct the receiver to make if this were an application by the solicitor or by the company to the Court to direct such payment to be made. I find by the Act 42 Vict. ch. 62 (O.), that an agreement had been entered into between the two companies on the 14th July, 1876, for the leasing by the Simcoe Junction to the Toronto and Nipissing of the railway of the former, which agreement contained a provision that the latter railway company should not be required to work the railway of the former until the managing director of the lessees had certified, *inter alia*, as to the purchase and payment of the right of way taken and required by the Toronto and Nipissing. I am not informed whether the railway of the lessors had been worked by the company of the lessees under the agreement of 1876, whether the manager of the latter had certified, or what had been done, under the agreement before the appointment of the receiver; or how it is, if this be the case, that these professional services, which in that case would appear to belong properly to an earlier date, come to be rendered and charged for after the appointment of the receiver. I do not say that it may not be shewn that it is proper that the solicitor should be paid for the services in question, out of the funds which come to the hands of the receiver, but I have to say that it is not shewn upon the material before me.

The appeal is dismissed, with costs. The receiver being allowed to take an order sanctioning the payment of \$55.97 to *Armstrong*—this may be embodied in the one order. The costs taxed to the respondent

1881.
Goderham
v.
Toronto &
Nipissing
R. W. Co.

Judgment.

1881. should be only such costs as he would have been entitled to if the appeal had been only in respect of the disallowance of the item of charge for solicitor's fees.

Goederham
v.
Toronto &
Nipissing
R. W. Co.

LARIO V. WALKER.

Conveyance in fee—Repugnant limitations—Pleading—Demurrer.

The grantor conveyed certain lands to the grantee, his heirs and assigns, and by a proviso at the concluding part of the deed declared "nevertheless, that the above *L.* shall have no right to sell, alien, or dispose in any way whatsoever of the above mentioned premises, but have only the use during his life-time, after which his children will have full right to the said property above mentioned."

Held, on demurrer, that such proviso was repugnant to the grant and *habendum* in fee, and therefore void.

The bill stated that the plaintiff was grandson of *L.*, who had died intestate.

Held, that this did not sufficiently state the title of the plaintiff.

The bill was by *Joseph P. Lario* against *Hiram Walker*, setting forth that in 1837 one *Anthony Lagrave*, being owner of certain lands in the township of Sandwich, by a deed of the 16th October of that year, conveyed the same to one *Louis Labadie*, "to have and to hold the said land and premises with the appurtenances unto the said *Louis Labadie*, his heirs and assigns, to the sole and proper use, benefit, and behoof of the said *Louis Labadie*, his assigns for ever;" with absolute covenants for title, peaceable and quiet possession, further assurance, &c., with a proviso subsequently contained therein "that the above *Louis Labadie* shall have no right to sell, alien, or dispose in any way whatsoever of the above-mentioned premises, but have only the use during his life-time, after which his children

will have full right to the said property above-mentioned." 1881.

The bill further stated (3) that *Louis Labadie* died intestate on the 16th September, 1863, leaving the plaintiff, his grandson, him surviving; (4) that *Louis Labadie* on the 19th November, 1844, by deed duly registered, conveyed the said lands to his son *Charles J. Labadie*, who on the 4th of April, 1866, by deed duly registered, conveyed the same to the defendant; (6) that both the said *Charles J. Labadie* and the defendant had, before acquiring any interest or alleged interest in the lands, full actual notice of the limited estate of *Louis Labadie* in said lands, and of the rights of the plaintiff therein; and (7) the defendant refused to recognize the title of the plaintiff to his share thereof. And the bill prayed that it might be declared that the plaintiff was entitled to share in the said lands with the defendant; and that the same might be partitioned, and for further relief.

Lario
v.
Walker.

The defendant demurred for want of equity.

Statement.

On the argument the defendant demurred *ore tenus*, on the ground that the plaintiff had not sufficiently stated his own title on the face of the bill, as for all that appeared his father might be alive, or if dead might have executed a will devising the property to parties other than the plaintiff.

Mr. Caswell, for the demurrer.

Mr. Boyd, Q. C., contra.

Walsh v. Trevanion (a), *Meyers v. Marsh* (b), *Brown v. Stuart* (c), *Owston v. Williams* (d), *Simpson v. Hartman* (e), *Broome's Legal Maxims*, 4th ed., sec. 64, p. 556, were referred to.

(a) 15 Q. B. 733.

(b) 9 U. C. R. 242.

(c) 12 U. C. R. 510.

(d) 16 U. C. R. 405.

(e) 27 U. C. R. 460.

1881. SPRAGGE, C.—The principal question raised by this demurrer is whether one *Louis Labadie*, who is dead intestate, took a fee or life estate, under a conveyance to him from one *Anthony Lagrave*.

Lario
v.
Walker.

Feb. 16th.

The conveyance, which is dated the 16th of October, 1837, is expressed to be for the consideration of £400, paid by the grantee to the grantor, and purports by the usual words grant, bargain, sell, release, and confirm, to convey certain lands therein described, unto the said *Louis Labadie*, his heirs and assigns for ever.

The habendum is "unto the said *Louis Labadie*, his heirs and assigns, to the sole and proper use, benefit, and behoof of the said *Louis Labadie*, his heirs and assigns for ever." The deed contains covenants for good title, quiet possession, and further assurance. Then follows this proviso, "Provided always and nevertheless that the above *Louis Labadie* shall have no right to sell, alien, or dispose in any way whatsoever of the above mentioned premises; but have only the use during his lifetime, after which his children will have full right to the said property above mentioned."

Judgment.

I think it is not material whether this proviso is to be regarded as a condition annexed to the estate conveyed, or a limitation of the estate. In *Doe Meyers v. Marsh* (a), the conveyance was to *Hannah Marsh*, her heirs and assigns; *habendum* "to the said *Hannah Marsh*, her heirs and assigns so long as she remains the widow of *Mathias Marsh*; but should she marry or decease," then to her two sons, naming them in fee. Sir *John Robinson*, who delivered the judgment of the Court, was of opinion that all that was said in the *habendum* should be looked at as "constituting a limitation rather than a condition, and as coming within the rule that where the *habendum* is repugnant and contrary to the premises, it is void; and the grantee will take the estate given in the premises."

(a) 9 U. C. R. 242.

In *Brown v. Stuart*, (a), the operative words and the *habendum* were in the same words, followed in the *habendum* by a proviso that if the grantee made default in performing a covenant therein set out, the deed should become void and the land granted should revert to the grantor. It was held that the condition could not stand with the grant, and that the condition was void.

1881.

Lario
v.
Walker.

In the subsequent case of *Owston v. Williams* (b), the same learned Judge expounded the rule and the reason upon which it was founded in the construction of conveyances; and while questioning the reasonableness of it still holding the Court bound to act upon it—following *Baldwin's case* (c), *Sheppard's Touchstone* (d), *4 Cruise's Digest* (e), and *Doe Timmis v. Steele* (f). In all these three cases the qualification of the estate given in the operative words was in the *habendum* itself. The rule must apply *a fortiori* where the *habendum*, as well as the operative words, carry the fee simple and the qualification as to the estate conveyed is in a subsequent part of the conveyance. In the conveyance in question it is after the covenants. I take it that the proviso at the end of this conveyance is by way of qualification or limitation, as put by *Coke* upon *Littleton*, sec. 329.

Judgment.

Nothing is more clear than that a condition or provision in any shape, that a grantee of a fee simple shall not alien, is repugnant and void, because the power of alienation is an inseparable incident of the estate. The further provision in this deed that the grantee shall only have the use of the land during his life, and that upon his death it shall go to his children, is also repugnant and void upon the grounds upon which the cases that I have cited from the Upper Canada reports were decided.

(a) 12 U. C. R. 510

(b) 16 U. C. R. 405.

(c) 2 Co. 236, (d) 102, 113, (e) 97, (f) 42 Q. B. 663.

1881.

Lario
v.
Walker.

The defendant demurs *ore tenus*, for that the plaintiff has not sufficiently pleaded his own title. All that he alleges is that he is grandson of the grantee, *Louis Labadie*, who died intestate. *Non constat* but his own father may be living. Neither *Grant v. Eddy (a)*, nor any other case that I have seen warrants me in taking this as a sufficient allegation that the plaintiff is entitled, under a limitation over upon the death of *Louis Labadie* to his children.

I have examined all the cases to which I have been referred in this case, and some others. Those cited for the plaintiff are distinguishable; but to point out wherein they are distinguishable would occupy more time and space than I have at my disposal.

The demurrer is allowed, with costs.

(a) 21 Gr. 45, 568.

1881.

ADAMSON V. ADAMSON.

Statute of Limitations—Equitable remainder—Practice—Dismissal of former bill—Reading evidence in former suit—Secondary evidence—Res judicata.

The plaintiff, who was a *cestui que trust* in remainder, acquired the legal estate three years after the death of the tenant for life. It was attempted to be shewn by the defendant, who, with her husband, had been in possession by herself or her tenants for eleven years when the tenant for life died, in 1875, that she was entitled to the land by length of possession :

Held, that the facts in the case would not support such a contention, as no laches could be imputed to the plaintiff for not having compelled the trustee to take proceedings to obtain possession at an earlier date, for his right had only been acquired on the death of the tenant for life, and therefore his claim to the land was not barred.

A former suit had been instituted by the plaintiff, which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed.

Held, (1) that under such circumstances the question was not *res judicata* ; and (2) that the evidence taken in the former suit and the examination of defendant by the plaintiff therein were admissible in the present one, the issue being practically the same.

This was a suit instituted by *Alfred Adamson* against *Mary D. Adamson*, the bill in which set forth that *Joseph Adamson*, father of the plaintiff, was tenant in fee of the lands in question in the cause. The evidence adduced shewed that by indentures of lease and release dated the 8th and 9th days of August, 1837, *Joseph Adamson* had conveyed the premises to *Peter Adamson* and *James Coleman*, in trust for the use of *Ellen Adamson*, the wife of the grantor, for life, remainder to their two sons, *George Adamson* and the plaintiff, as joint tenants in fee. The trustees it appeared had let *Ellen Adamson* into possession or receipt of the rents of a parcel of the lands in question as tenant for life.

Statement.

The bill further alleged that in the spring of 1863 *Ellen Adamson* demised this lot to *Charles Adamson*,

1881. the husband of the present defendant. In December, 1863, *Charles Adamson* died, leaving the defendant his widow, who continued in possession, or in receipt, of the rents and profits of the lot so demised to *Charles*; and *George Adamson*, in 1865 died, leaving the plaintiff solely entitled in remainder. The bill further stated that some years after the execution of the deed of trust *Coleman* died, leaving *Peter Adamson* his co-trustee surviving, who died in 1865, having by his will, dated the 7th of March, 1864, devised the legal estate in the trust property to *Charles Mitchell* and wife, who on the 26th of January, 1878, conveyed the same to the plaintiff. *Ellen Adamson*, the tenant for life, died in February, 1875.

The answer of the defendant denied the demise of the lot in question to her late husband, or that he had ever been in possession thereof as tenant to *Ellen Adamson*, and alleged that her husband died about the 20th of December, 1863, intestate, being then, and having been for some time previously in actual possession; and that since his death she and their children had continued in such possession. She also raised the defence of the Statute of Limitations.

Statement.

At the hearing it was shewn that the tenant for life had been in actual possession by herself or her tenant, one *George Lawrence*, up to the 16th of October, 1862, as was evidenced by the production of receipts for rent; she then put her son *Charles Adamson* into possession, but still continued to assert her own title.

The cause came on for the examination of witnesses and hearing at the sittings at Toronto, in the autumn of 1878. The facts then established were substantially as above set forth.

Mr. *Attorney-General Mowat* and Mr. *MacLennan*, Q.C., for the plaintiff.

Mr. *Blake*, Q.C., and Mr. *Bethune*, Q.C., for the defendant.

In addition to the cases mentioned in the judgment, 1881.
 counsel cited and commented on, *Mills v. Capel* (a),
Thompson v. Simpson (b), *Garrard v. Tuck* (c), *Hill v.*
Wilson (d), *Asher v. Whitlock* (e), *The Attorney-Gen-*
eral v. Magdalen College (f).

Adamson
 v.
 Adamson.

SPRAGGE, C. —Some preliminary objections are raised Feb. 15th,
 on the part of the defendant. This is the second bill
 filed by the plaintiff against the defendant. The
 former bill was filed before the plaintiff obtained a
 conveyance of the legal estate from the *Mitchells*.
 The bill was for possession as entitled in remainder
 after the death of the tenant for life, and for injunction
 to restrain waste (g). The learned Vice-Chancellor held
 that the bill was premature so far as it sought posses-
 sion, as the plaintiff had not acquired the legal title
 till after the filing of the bill, and *Mitchell* was not
 made a party; and he held that the case made for
 waste was not sustained by the evidence, and the
 bill was dismissed with costs; but dismissed "without Judgment.
 prejudice to any other proceeding the plaintiff may
 take on his present title;" that would be on his legal
 title which he had then acquired as well as on his
 equitable title. The decree as drawn up is substan-
 tially in accordance with the judgment, adding "under
 his title, acquired *pendente lite*."

The defendant now contends that the matter in
 question in this suit is *res judicata* in the former
 suit. It is not set up by the answer, and the defen-
 dant now asks for leave to set it up by supplemental
 answer. It could not have been intended, and the
 learned Vice-Chancellor's judgment gives no warrant
 for the contention, that in any future proceeding the
 plaintiff should be confined to his title acquired *pen-*

(a) L. R. 20 Eq. 692.

(c) 8 C. B. 231.

(e) L. R. 1 Q. B. 1.

(g) 25 Gr. 550.

(b) 1 Dr. & Wn. 489.

(d) L. R. 8 Ch. 888.

(f) 6 H. L. C. 189.

1881. *dente lite*, to the exclusion of his title as *cestui que trust* under the trust deed of *Joseph Adamson*. All that was decided upon that branch of the plaintiff's case was, that whatever the case of the plaintiff as *cestui que trust*, whether well or ill founded, as to which there was no adjudication, his bill was premature, as he had not then acquired the legal title. If I should now put the defendant in a position in which she could set up that as *res judicata*, which was not in fact adjudicated, I should frustrate instead of carry out the expressed intention of the learned Judge before whom the former cause was heard. I decided a point analogous to this in *Mitchell v. Strathy* in March last (a).

Adamson
v.
Adamson.

I do not say that the decree in the former suit, if set up, would be *res judicata*, upon the case made in this suit; but I ought not at any rate to assist the defendant in setting it up.

Judgment.

The plaintiff offers as evidence in this suit the examination in the former suit of the defendant by the plaintiff; and also the evidence taken *vivâ voce* at the hearing of the same suit. The defendant objects, but I think both are admissible. Mr. *Daniell*, 5th ed. 764, states the rule as I have always understood it (except of course that in this Court no order is necessary.) "The depositions of witnesses which have been taken in another cause may, as well as other proceedings, be read at the hearing, (under an order to be obtained for that purpose), if the two suits are between the same parties or their privies, and the issue is the same, and such depositions are admissible in evidence in the former cause." Here all these necessary elements concur; and the question in this suit was the same as in the former suit, the difference between the two suits being that one remedy sought in that suit is not sought in this. The plaintiff failed in that suit for reasons apart from that which was the

(a) See *ante* page 80.

question in issue between them. The question, or the questions between the parties, were whether the plaintiff was *cestui que trust* in remainder under the trust deed of his father; and whether his remedy was barred by the Statute of Limitations. The real substantial issue between the same parties in both suits has been, whether the plaintiff is barred by the statute.

1881.
Adams
v.
Adams.

In *Williams v. Williams* (a), Sir Richard Kindersley puts the question thus: "The principle upon which the Court acts in these cases is, that if there is another suit instituted between the same parties or their representatives, and the issue is substantially the same in both, that which would be, and in fact was, evidence in the former suit, may be read in the latter." The examination of the defendant in the former suit would seem to be admissible also as evidence on another ground, viz., as admissions against interest.

The principal question raised is, as I have said, under the Statute of Limitations. If the title of the plaintiff had been legal instead of equitable, there could, I apprehend, be no difficulty in his case. The effect of the corresponding section of the English statute is so succinctly and accurately stated in Messrs. *Darby & Bosanquet's* book on the Statute, p. 236, that I cannot do better than quote from it. Speaking of cases of legal title it runs thus: "The effect of the fourth branch of the third section and the fifth section is, in general, to give the person entitled to a future estate a new right at the time when the preceding estate determines, so that if the owner of an estate grant out of it a particular estate with reversion or remainders following, and the owner of the particular estate takes possession, the right of the persons entitled in reversion or remainder will accrue at the determination of the particular estate; and this

Judgment.

(a) 10 Jur. N. S. 608.

1881.
Adamson
v.
Adamson

even if the grantor had discontinued possession before the time of his grant. Though the statute may be running against a settlor at the time the settlement is made, yet the fact of the grantee of a particular estate taking possession under the settlement will revest the title of all persons entitled to remainders under the settlement, as well as that of the settlor and his heirs in reversion. If, however, twenty years elapse after the dispossession of the grantor, without the grantee of the particular estate entering into possession, the provisions under discussion would not save the persons entitled in remainder or reversion from being barred, as the grantor's title, and that of those claiming through him, is then extinguished as from the time when the statute began to run, and therefore the particular estate is treated as if it never came into existence." The point is also stated with great clearness in Mr. *Hayes's* book on Conveyancing, 5th ed., vol. I, p. 253.

Judgment.

The 29th section of our Act, R. S. O. ch. 108, places equitable titles upon the same footing, as regards the statute, as legal titles, giving statutory force to what had theretofore been held by Courts of Equity by analogy to or as following the enactments of previous Statutes of Limitations in regard to legal titles. So that as observed by the learned writers whom I have just quoted (p. 234), with certain exceptions which do not apply to this case, "it may be taken that every suit in equity, the nature of which is in any way to recover land or rent, is within the 24th section," the section corresponding to the 29th in our Act.

None of the cases cited, and none that I have seen, controvert the positions I have quoted from *Darby & Bosanquet*. They are either instances of the application of these sections of the statute, or exceptions, taking or assuming to take particular cases out of the statute.

There is no evidence as to the actual occupation of the land in question before the occupation by *George Lawrence*, as tenant of *Ellen Adamson*, the tenant for life. It is stated in the evidence of the plaintiff that in 1862 both lots one and two were in the occupation of *Lawrence* as tenant of *Ellen Adamson*; and we have a receipt in the handwriting of *Mrs. Adamson*, produced from the custody of *Lawrence*, dated 16th of October of that year, on account of rent due the 1st of that month. There is a previous receipt of 23rd of March, 1859, with the same signature and from the same custody, and there is an agreement of the 12th of January, 1856, which is as to part, and may be as to all, in relation to lot 1, which is not in question in this suit. I infer from the evidence that neither *Mrs. Adamson* nor the trustees were ever in actual occupation of the land in question. Whether *Joseph Adamson* the settlor was does not appear. The possession, I apprehend, would, in the absence of evidence, be attributed to the owner; and *Mrs. Adamson* would, in the eye of the law, upon the circumstances appearing in evidence, be regarded as agent of the trustees; *Melling v. Leak (a)*.

1881.

Adamson
v.
Adamson.

Judgment.

There is no evidence of adverse possession, nor any evidence of possession other than under *Mrs. Adamson*, at any rate until after the death of the defendant's husband: if then, which I will consider presently. The possession of the husband commenced in 1863: but as the evidence in relation to possession is to a great extent that of the plaintiff, and it is objected that, under the Evidence Act, it requires corroboration, and is not corroborated, I will first consider that objection.

I will assume that, under the Evidence Act, the evidence of the plaintiff requires corroboration. Taking this to be so, it is largely corroborated by the evidence of the defendant herself.

(a) 16 C. B. 669.

1881. I gave my opinion as to the nature of the corroborative evidence required under the Statute in *McDonald v. McKinnon* (a).

Adamson
v.
Adamson.

I find that such independent support is given to the evidence of the plaintiff, even by the evidence of the defendant herself, as to raise in my mind, if not the conviction, still the belief that the plaintiff is to be depended upon even in those matters in which I do not find corroboration elsewhere. There is nothing in the evidence of others, or in proved circumstances that at all militates against the truthfulness of his evidence, but a good deal in support of it.

Judgment. I take, then, the facts to be, that for several years before the defendant's husband got into possession, for four years at the least, probably for eight years and, for all that appears, from the very creation of the trust, Mrs. Adamson dealt with this property as *cestui que trust* tenant for life; in fact as her own during her life; and the presumption is, that she so dealt with it with the acquiescence of the trustees: that in 1862 she let the two lots to the plaintiff at an agreed rental; that in 1863 she, with the assent of the plaintiff, placed the defendant's husband, (who was also her son,) in possession of lot two as her tenant under an agreement that he should make repairs to the house on the premises in lieu of a money payment of rent. He had been in possession less than six months when he died. Whether his agreement for tenancy was for a term, or whether it was a tenancy from year to year, does not appear. The defendant continued in possession with her children, Mrs. Adamson still claiming title, and claiming but not exacting rent from the defendant, and there being no denial of her title, nor, so far as appears, any wrongful act on the part of the defendant. There was then no adverse possession on the part of the

(a) 26 Grant, at p. 16.

defendant's husband or herself. She may have been tenant at will, or tenant at sufferance. I think it is immaterial which upon any question in this case. It may be that her possession would have extinguished the title of Mrs. *Adamson* if Mrs. *Adamson* had lived long enough: but she died in 1873: when, assuming that the statute had commenced to run at the expiration of one year from the death of the defendant's husband, it would only have run eleven years.

1881.
Adamson
v.
Adamson.

In *Melling v. Leak* (a), there was no remainder-man, no future estate to give a new start to the Statute; and it might well be held that twenty years adverse possession extinguished the right, both of the *cestui que trust* and the trustee.

It has been said, in some cases, that a *cestui que trust* must suffer if he neglects, at the proper time, to set the trustee in motion against a person in possession; but that can only apply where there has been neglect on the part of the *cestui que trust*, as was the case in *Melling v. Leak*, and as was also the case in *Bond v. Hopkins* (a), where Lord *Redesdale* said: "If the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the Statute, the Court, acting by analogy to the Statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law, he shall be barred in equity." Here, the plaintiff could not have put the trustee in motion (unless to restrain waste,) until he, as remainder-man, became entitled to possession by the death of the tenant for life. No laches previous to that date is imputable to him.

Judgment.

This distinction is taken by Mr. *Lewin*, 7th ed., 738, just before the passage quoted from his book by defendant's counsel. After quoting the language of

(a) 16 C. B. 689.

(a) 1 S. & L. 413. p. 429.

1881. Lord *Hardwicke*, in *Lewellen v. Mackworth* (a), and of Lord *Redesdale*, in *Hovenden v. Lord Annesley* (b), and the comments of Lord *Manners*, in *Pentland v. Stokes* (c), upon the principle enunciated by Sir *Joseph Jekyll*, in *Lechmere v. The Earl of Carlisle* (d), that "the forbearance of the trustees in not doing what it was their office to have done, should in no sort prejudice the *cestui que trust*," the learned writer adds: "But the question still remains whether in cases where the *cestui que trust* would, if his title were legal, have more than the ordinary time to sue (as where he is under disability or entitled in remainder only,) he will be allowed the same extended period for suing in equity, notwithstanding that the trustees may be barred." Then, after intimating his opinion that in the case of debt on covenant or contract, where the trustee is barred, the *cestui que trust* is barred also, he adds: "The same result would seem to follow where the subject matter of the trust is land, and the possession has been held adversely to both trustee and *cestui que trust*, without any species of privity, as when the trustee is disseised. Here there is generally no remedy in equity. The proper course for the *cestui que trust* is to bring ejectment in the name of the trustee." The concluding sentence would seem to confine Mr. *Lewin's* proposition to cases where the *cestui que trust* has a present right of possession, not to cases of future interests. Taken in the wider sense, as it seems to be understood by Messrs. *Darby & Bosanquet*, pp. 325-9, it is controverted by those learned writers, who point out that the doctrine would lead to "very startling consequences," and comment upon what they conceive to be fallacies involved in Mr. *Lewin's* position.

There is much force in the reasoning of those learned writers on the subject; but I do not pursue the point

Judgment.

(a) 2 Eq. C. Ab. 579.

(c) 2 B. & B. 75.

(b) 2 S. & L. 629.

(d) 3 P. Wms. 215.

further, because the position taken by the answer, that the possession taken by the husband, and held by him and by the defendant after him, was adverse to the tenant for life, is wholly displaced by the evidence, to which I have already referred, by the evidence of the defendant herself as well as that of the plaintiff. It is only to cases of adverse possession, without any species of privity, that the position taken by Mr. *Lewin* applies.

1881.
Adamson
v.
Adamson.

My conclusion is, that there is nothing to bar the right of the plaintiff, as remainder-man, to recover in this suit; and the decree must be with costs.

The plaintiff asks, by his bill, for delivery of possession, and an account of rents and profits. The account was not asked for at the hearing, and I do not know whether it is pressed for now. I should give it only from the filing of the bill, following *Penny v. Allen* (a), and *Morgan v. Morgan* (b).

I find I have omitted to say anything as to the proof of the original trust, as to which a good deal of evidence has been given, but which, it is contended, is not sufficient. We have that which is shewn to be a true copy, and the original has been traced into certain hands, where every search has been made for it, without success. I think the evidence sufficient for the admission of secondary evidence, which has been given.

Judgment.

(a) 7 D. M. & G. 409, 428.

(b) L. R. 10 Eq. 99-104.

1881.

STEVENSON V. STEVENSON.

Will, construction of—Land subject to mortgage—Right to redeem given by testator—Costs.

The testator was seized of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, *R.*, to whom the first privilege of redeeming was given, availed himself thereof and redeemed the property, which was subject to certain charges imposed by the will in addition to the incumbrances.

Held, that the right to redeem was in effect a right to purchase, as the mortgages and charges created by the will amounted to about as much as the land was worth; and that *R.* had acquired a good title free from any claim of his brothers; and his brothers having instituted proceedings against him claiming an interest in the estate that he was entitled to recover his costs, not out of the estate of the testator but from the plaintiffs personally.

This was a suit brought by *John Stevenson* and *James Stevenson*, sons of one *William Stevenson*, against their brother, *Robert Stevenson*, and the executors of the will of *William Stevenson*, and *The Freehold Loan and Savings Co.*

Statement.

It appeared that *William Stevenson*, who died on the 29th May, 1859, duly made and published his will as follows:

"I, *William Stevenson*, of the township of Normanby, in the county of Grey, of the Province of Canada, late farmer of the said township, of the age of fifty-two years, and being of sound mind and memory, do make, publish, and declare this my last will and testament, in manner following, to wit:

My will is that my funeral charges and just debts shall be paid by my executors, hereinafter named. The residue of my estate and property which shall not be required for the payment of my just debts, funeral charges, and the expenses attending the execution of this my will, and the administration of my estate, I give and devise and dispose thereof as follows, that is to say:

First, I give and bequeath to my wife *Jane Stevenson*, the sum of two hundred dollars to be received and accepted by her in lieu of dower, also the use of my house and rent of the estate, either in money or share of the crops, as it may be. The house and rent to help to raise my children *Margaret*, *Isabella*, and *Jane Stevenson*, and on no other condition, the two hundred dollars to be given my wife should she wish to leave the place or get married again, and then she is not to have the use of the estate or house-rent in money, or share of crops any longer, and should she conduct herself improperly she is

to receive nothing; and she is only to receive the two hundred dollars when she is leaving the place or after getting married again, then to have no further demand on the place, and should she stop on the place until my daughters become of age, she is to receive the two hundred dollars when the girls are of age, from the sale of the estate.

1881.

Stevenson
v.
Stevenson.

Second, I give and devise to my daughters *Margaret, Isabella, and Jane Stevenson* aforesaid, their heirs and assigns, the sum of two hundred dollars each, to be paid them when they get married, provided it is with the consent of my executors, or when they come to age.

Third, I give and devise lot No. 60 second concession, Normanby, to *James Stevenson*, who is to pay to *Robert and John Stevenson*, my sons by my first wife, the sum of twenty dollars each, two years after my decease, and should he not pay them my executors are to pay them out of lot 60; *James Stevenson* to receive the balance of sale.

And lastly all my personal property is to be managed by my executors to the best advantage for my wife and family, and I hereby name *William H. Ryan, Joseph Williamson, and Robert Owens*, all of the township of Normanby, County of Grey, Province of Canada, as my executors of this my last will and testament, hereby revoking all former wills by me made.

The estate first mentioned and house is No. 62, second concession township of Normanby, and which is to be sold when all my daughters are of age, unless my sons by my first wife wish to redeem the place, of which I give them the privilege, giving *Robert Stevenson* the first opportunity of redeeming the place; should he not be able or not wish to, *John Stevenson* to have the second opportunity. Should *Robert Stevenson* not do so, and should *Robert* or *John Stevenson* not redeem it, then *James Stevenson* to have the privilege, and should not *Robert, John, or James Stevenson* redeem it, the executors to sell the place, pay off the liabilities, and divide the remainder amongst *Robert, John, and James Stevenson*, in equal portions.

Statement

Dated this 8th day of April, 1859."

Robert Stevenson, the elder son named in the will, assuming to act under its provisions, mortgaged to the defendants *The Freehold Loan and Savings Co.*, lot 62 mentioned in the will, to secure \$1,000. Of this sum it appeared that *Robert Stevenson* paid over \$800 to the executors, who paid that sum to two of the testator's daughters, *Margaret and Isabella Stevenson*, in full of the legacies bequeathed by the will to the mother and to the three daughters.

The plaintiffs claimed that *Robert Stevenson* had not become entitled under the will to the land mortgaged, and prayed for a construction of the will and for a sale of the land, and for an administration of the estate.

1881. *Stevenson v. Stevenson.* It was conceded on the argument that the mother and *James Stevenson* had both died before they had become entitled to their respective legacies. The value of the land mortgaged was proved to have been at the time of the testator's death about \$800, although at the date of the mortgage (10th September, 1877) the land was worth \$2,000. There were few if any debts of the testator remaining unpaid, and there was only a small amount of personalty, the latter being chiefly expended on the estate after the testator's death.

On the hearing the Court directed that the usual administration accounts should be taken, and reserved the question of the construction of the will until the result of those inquiries should be reported. The Master having made his report shewing the facts above set out, the case came up on further directions as to the construction of the will. The contention turned on the force of the expression "to redeem."

Mr. *W. Cassels*, for the plaintiffs.

Mr. *C. Moss*, for the defendants, other than the *Freehold Loan and Savings Co.*

Mr. *R. E. Kingsford*, for the defendants *The Freehold Loan and Savings Co.*

March 11th. *PROUDFOOT V. C.*—At the hearing yesterday I expressed my opinion, which subsequent consideration has confirmed, that—when the testator directed the land to be sold unless his sons in succession should redeem the place, of which he gave them the privilege: to *Robert* first, *John* second, and *James* last; and in case all refused, then the executors were to sell, and, after paying the charges, to divide the remainder among these three sons—the redemption meant was a right to purchase, for which the price was payment of the charges imposed by the will.

Judgment.

The obscurity from the phraseology used is somewhat removed by the evidence of the condition of the property at the date of the will and of the testator's death. The land was not considered of value beyond the charges, and any of the sons *redeeming* it would pay as much as it was thought to be worth. And upon the language of the will itself, and the circumstances in regard to the property, I have no doubt that *Robert*, who chose to redeem, has a good title.

1881.
Stevenson
v.
Stevenson.

I think the plaintiffs must pay the costs of the suit. It is not properly a bill for the construction of the will, but it is an assertion of a title, depending indeed on the construction of the will. It is purely a question between the plaintiffs and the devisee of the part of the estate acquired by *Robert*: *Hesp v. Bell (a)*. There should not, in my opinion, be any difference made in regard to the executors' costs. The estate was a small one: \$300 of personalty seem to have come to their hands twenty years ago, and of this, in pursuance of the terms of the will, giving the use of the house and rent of the estate to the widow, they left \$178 worth in her possession. And the final result is, that about \$32 is in their hands for the benefit of the plaintiffs. The plaintiffs are sons of the testator, and knew well enough the amount of the estate, and what was being done with it; that their mother was maintaining their sisters, and must have known that there would only be a trifle for either of them. It seems to me that the administration has been asked for to cover the real claim, which was to the lot *Robert* has got; and in that they fail.

Judgment.

The executors may retain the money in their hands on account of their costs.

(a) 16 Gr. 412.

1881.

SCHLIEHAUF AND OXFORD V. CANADA SOUTHERN
RAILWAY COMPANY.

*Railways—Deed of lands for station grounds—Agreement as to
position of station buildings.*

An engineer of the defendants, whose duty it was to obtain transfers of land and determine the situations of station houses, procured from the plaintiffs, for nominal considerations, grants of land for a Station house and ground, representing that the Station would be put as desired by the plaintiffs at a certain point, advantageous to both. The deed of the plaintiff *S.* contained this proviso: "Provided that the said Company, their successors and assigns, do erect and maintain on the said lands a station for the accommodation of passengers and freight, and name the same *B.*" The station was erected on the land in the deed containing this proviso, but not at the point represented.

Held, that though the plaintiffs had the expectation that the station would have been placed where they desired, yet there had been no deceit practised by the defendants' engineer for the purpose of obtaining the grants of the land; that the engineer had no power to bind the defendants to such a thing; and that the defendants had done all they were bound to do by observing the proviso in the deed, which called for the erection of the station house on the lands without specifying any particular point.

This cause came on for the examination of witnesses and hearing at the sittings of the court at London.

Statement. The facts out of which the suit arose are fully stated in the judgment.

Mr. *Becher* Q. C. and Mr. *Street* for plaintiffs.

Mr. *Crooks*, Q. C., for the defendants.

*Raphael v. Thames Valley R. Co. (a), Smith v. The
Dublin and Bray R. Co. (b), Wilson v. Furness R.
Co. (c), Mason v. Scott (d), Marlow v. Queensborough (e),*

(a) L. R. 2 Chy. 147.

(c) L. R. 9 Eq. 28.

(e) 1 S. & S. 520.

(b) 3 Ir. Chy. 225.

(d) 22 Gr. 592.

Erskine v. Adeane (a), *Mann v. Nunn* (b), *Bettridge v. Great Western Ry. Co.* (c), *Jorden v. Money* (d), *Maunsell v. White* (e), *Stockton &c. R. Co. v. Brown* (f), *Gage v. Newmarket Railway Co.* (g), were referred to by counsel.

1881.
Schliehauf
and
Oxford
v.
Canada
Southern
Railway Co.

SPRAGGE, C.—The plaintiffs were owners of portions of lots 18 and 17 in the 3rd concession of Aldborough, in the year 1872, and the defendants' company had acquired from previous owners a right of way through those lots. The company contemplated placing a station in that locality. The plaintiffs were anxious that this should be done; and one of them, *Schliehauf*, who is a German, had commenced the laying out of a village on the part of lot 18 owned by him, and was anxious that the station should be placed there, and that the company should call it Bismarck. The place appears to have been spoken of previously as the Graham Road; a road so called formed the easterly boundary of lot 18.

Judgment.

Oxford made a conveyance to the company dated the 1st of April, 1873, of five acres and $\frac{97}{100}$ of the south half of lot 17. The conveyance recites that the company were desirous of acquiring the same to be used as station grounds for their railway, and had contracted with the grantor for the purchase thereof. The consideration expressed is the premises and \$1.00. The conveyance from *Schliehauf* to the company, which is dated the 7th of April, 1873, contains the same recital, and the consideration expressed is the same, the conveyance is of eleven acres and $\frac{45}{100}$ and it contains a proviso after the *habendum*: "that the said company, their successors and assigns, do erect and

(a) L. R. 8 Chy. 756.

(c) 3 Er. & Ap. 58.

(e) 4 H. L. C. 1039.

(g) 18 Q. B. 451.

(b) 30 L. T. N. S. 526.

(d) 5 H. L. C. 185.

(f) 9 H. L. C. 246.

1881. *Schliehauf and Oxford v. Canada Southern Railway Co.* maintain on the said lands a station for the accommodation of passengers and freight, and name the same Bismarck." No such stipulation is contained in the conveyance from *Oxford* to the company.

Buildings for a station have been erected and are used on the portion of lot 18 conveyed by *Schliehauf* to the company, so that the stipulation contained in his conveyance has been literally complied with. What he and his co-plaintiff complain of is, that it has not been erected on a particular part of 18, *i.e.*, at a place equidistant from the easterly boundary of the land conveyed by *Schliehauf* and the westerly boundary of the land conveyed by *Oxford*: and they found their claim that it should be placed there upon assurances given, as they say, by Mr. *Finney* chief engineer of the road, that it should be placed there; and their case is that it was upon the faith of these assurances that they made their conveyances to the company.

Finney's position was that of chief engineer for the construction of the road, under the control of Mr. *Courtwright*, president of the company. Mr. *Crooks* was solicitor of the company, and Mr. *Harris*, a solicitor, was employed to negotiate for right of way and station grounds, and received his instructions from *Finney*. He also drew conveyances from landowners to the company. Those from the plaintiffs were drawn by him, and executed in his presence. Besides the chief engineer there were engineers of sections. Mr. *Harris*, in answer to a question whether he knew as a matter of fact that *Finney* did refer to Mr. *Courtwright* for directions, or that it was his habit to do so, answered, that in any matter of importance he did, and that he often consulted him as chief engineer of the road. I am not certain whether by this was meant that *Finney* as chief engineer often consulted Mr. *Courtwright*, or that Mr. *Courtwright* was himself chief engineer; and it is not very material. Either way it shews that *Finney* was subordinate to Mr. *Courtwright* in *Finney's*

own department, the constructing of the road as 1881.
 engineer, and that their relations were not merely
 nominal.

With regard to what passed in relation to the placing
 of the station buildings at the point claimed by the
 plaintiffs, I take it to be more safe to refer to the
 evidence of Mr. *Harris* than to that of the plaintiffs,
 particularly to that of *Schliehauf*.

It is clear from the evidence that *Finney* intended
 that the station buildings should be placed at the spot
 now claimed by the plaintiffs, that he authorized Mr.
Harris to communicate this intention to the plaintiffs,
 and to use the communication as a means for procur-
 ing from them a grant of the land without the pay-
 ment of any money consideration. This intention of
Finney was still further evidenced by the collecting of
 materials by the company at the spot indicated for the
 erection of a station house. At this juncture came the
 financial difficulties of the company, and nothing further
 was done until the company sufficiently recovered itself
 to resumework, when a building belonging to *Schliehauf*
 was moved to the spot and fitted up as a station, and
 used for about two years. At the expiration of that
 time, new buildings were erected upon the land con-
 veyed by *Schliehauf*, and these have since been used
 as the Bismarck Station House. They are about 400
 feet from the Graham Road, and about 1,100 feet from
 the centre of the 3,000 feet conveyed by the two
 plaintiffs.

The evidence convinces me that the change is a
 judicious one in the interests of the railway company
 and of the public; that the retention of the old site
 would have been a loss to the former and a very
 serious inconvenience to the latter. What the bill
 asks for is: 1st. That the company be restrained from
 having their station at Bismarck at any other point
 than the one claimed by them. 2nd. For specific per-
 formance to erect and maintain a station at that point;

Schliehauf
 and
Oxford
 v.
Canada
Southern
Railway Co.

Judgment.

1881.
Schlehauf
and
Oxford
v.
Canada
Southern
Railway Co.

or 3rd. In the alternative, that the defendants be directed to reconvey the lands in question to the plaintiffs respectively; and there is the usual prayer for general relief.

The evidence being that the present site is much more suitable than the one claimed as a site for a station, and that the public interest would suffer by its removal, are strong reasons against granting relief in any of the shapes specifically prayed for. If any relief were granted it ought to be only in the shape of pecuniary compensation.

It is certain from the evidence that the removal of the station to its present site is a very serious loss to both the plaintiffs, more especially perhaps to *Oxford*. If it had been built at the site first proposed his land would have been more available for village lots, than with the present site of the station it is likely to be. The inducement with both the plaintiffs was the expectation, based upon the communications made to them by Mr. *Harris*, and which were authorized by *Finney*, as to the exact location of the station; and I think it is to be inferred that but for those communications the plaintiffs would have claimed pecuniary compensation, and would have probably put the railway company to an arbitration. I do not say that there has been an entire failure of consideration. Mr. *Harris* says that supposing the station not placed at the place claimed by the plaintiffs (*i.e.*, as I understand the question), it has increased the value of the plaintiffs' property: "Oh yes it has, it has made a town out of a wilderness." Still there would have been the chance of arbitrators awarding pecuniary compensation.

The question after all must be whether *Finney* had authority to bind the company; and a subordinate question may be, what was the real meaning of the communication authorized by him to be made to the plaintiffs. He was engineer for the construction of the road, and chief engineer as distinguished from en-

gineers of sections of the road. He had a general policy, as it is called, in the evidence, as to the dimensions and quantity of land he should require for station grounds, and it was his policy as a general rule to place the station buildings about equidistant from the two extremes; this, though the general, was not the universal rule, for Mr. *Muir* shews that some are not so placed. In this instance he intended to follow the general rule, and I have no reason to doubt his good faith in the matter. He had authority to lay out the road; and as I gather from the evidence to designate the locality of stations, and to put up the necessary buildings; but he was engineer only for the construction of the road; that was his function as a civil engineer, if he had more authority it should have been shewn, and it has not been shewn, and what authority he had was subject to the control of Mr. *Courtwright*, and Mr. *Courtwright* himself was not the company but an officer of the company. These plaintiffs had no reason to suppose that *Finney* had authority to bind the company for all time to come; and if they did suppose so, their mistake in that respect could not possibly affect the company. But they do not say that either *Finney* or *Harris* represented that the engineer's authority was greater than it really was; nor do they even say in their evidence that they supposed that it was. They evidently understood the difference between having a stipulation expressed in a deed between them and the company, and an assurance from the engineer of the company. The two plaintiffs were acting together in parting with these lands to the company. One of the two had a stipulation in his deed that the station should be upon the land conveyed, that would operate to the benefit of both; and they had the assurance of the engineer as to his policy in the matter of the locality and that he would carry it out in that particular instance. It by no means follows that the company was

1881.

Schlebauf
and
Oxford
v.
Canada
Southern
Railway Co.

Judgment.

Schliehauf
 and
 Oxford
 v.
 Canada
 Southern
 Railway Co.

1881. to be bound for all time to come, or that they understood that the company was to be so bound, beyond the stipulation, that the station was to be on those grounds. There being that stipulation, and its being in the general terms that it is, is some evidence that they did not understand the company to be bound to place and maintain the buildings on any particular site upon those grounds; this under the maxim "*expressio unius exclusio alterius*."

Judgment. The position then of the plaintiffs is this. There is the stipulation in one of the deeds that the station shall be on the lands purchased, and it is on that land; and they had the expectation, probably a very confident expectation, that it would be on the spot indicated by *Finney*; and that it would remain there permanently, and they had reason to expect it. If it had been explained to them ever so clearly that *Finney* could not pledge the company to the permanency of the location, there was sufficient to induce them as reasonable men to make the conveyances as they did, *i. e.*, *Schliehauf* receiving no pecuniary consideration, and *Oxford* only \$200, the "converting of a wilderness into a town," has been of course a very great benefit to *Schliehauf*. The parties have not had all their expectations realized, but I incline to think they understood their position to be what I have stated it to be.

I have considered these points to see whether those acting for the company; in their zeal for the interests of the company, and in order to obtain these lands without pecuniary compensation, might not have deceived or misled these plaintiffs, and if so, I might have dismissed their bill without costs. I do not find that the plaintiffs have been deceived or misled.

As a matter of law my opinion is, that the engineer could not bind the company so as to fetter the future exercise of their discretion, as prayed by the bill; and further that he did not assume to do so.

The bill is dismissed, with costs.

1881.

WORKMAN v. ROBB.

Fraudulent conveyance—Statute of Limitations.

A bill was filed in 1880 alleging that in June, 1864, the defendant *L.* conveyed to the defendant *R.* a lot of land, which conveyance was either voluntary or the consideration received therefor had been repaid, and that *L.* had ever since occupied the lands, without any acknowledgment of title in *R.* up to January, 1880, when *L.* attorned to *R.*, placing his (*L.*'s) son in possession. On the hearing it was satisfactorily established that *R.* was a mortgagee of the property, and that in 1864 the equity of redemption had been released in consideration of further advances to *L.*, who then left the country, and did not return until 1867, when he went into possession, and expended large sums of money in improvements, made after consultation with *R.*, and which were so made in lieu of rent. The Court [PROUDFOOT, V. C.,] was of opinion that the suit entirely failed so far as it rested on the fraudulent character of the original transactions between *L.* and *R.*, and that *L.* had not acquired a title by length of possession, but that if he had he was not bound to assert it so as to enable an execution, sued out at the instance of the plaintiffs, to attach upon the property. *Keffer v. Keffer* (a), and *Foster v. Emerson* (b), remarked upon.

This was a suit instituted by *Elizabeth Workman* and *John Edgar*, the executrix and executor of one *Hugh Workman*, against *John Robb*, *Samuel Lorimer*, Statement. and *James Lorimer*, seeking to obtain payment of a judgment recovered by the plaintiffs against *Samuel Lorimer* out of lands alleged by the plaintiffs to be legally the property of the defendant in that action, under the circumstances stated in the judgment. The cause came on to be heard at the sittings of the Court at Brantford, in the Spring of 1881.

Mr. Moss, for the plaintiffs. As the Statute must be considered as having in effect conveyed a title to *Samuel*, or vested one in him, it is not material for us now to ascertain how or by what means it

(a) 27 U. C. C. P. 257.

(b) 5 Gr. 134.

1881. was done. There was in fact an absolute title to the property by possession, as he had occupied the premises from the year 1867 until 1880. There was no arrangement as to the terms of his going into possession, except that he was to occupy the property and make such improvements thereon as might be deemed necessary. In fact a tenancy at will was thus begun in 1867, and the Statute began to run in favour of the possessory right in 1868, and was perfected in 1878. *Truesdell v. Cook* (a), *Doe Perry v. Henderson* (b), *Doe Ausman v. Minthorne* (c), *Doe Quincy v. Canniff* (d), *Keffer v. Keffer* (e), shew that there was a complete bar created to any right of *Robb* in 1878, and after that no acknowledgment would revive the title in *Robb*: *McDonald v. McIntosh* (f), *McIntyre v. Canada Company* (g). It is not pretended that any surrender by deed was made; and had it been the fact that such a surrender was made, it would not have been considered effectual, as the Court would look upon it as a scheme to defeat or delay creditors, as he was insolvent, and the transaction would have been a purely voluntary one. In the *Bank of Upper Canada v. Shickluna* (h) a debtor had executed a voluntary discharge of a mortgage, and it was held to be void as against the bank.

Mr. *Hardy*, Q. C., for the defendants *Robb* and *James Lorimer*, contended that it was not necessary here to discuss the merits of the arrangement that had been made between the father and son. The rights of the defendant *Robb*, however, were of an entirely different nature. Neither *Robb* nor *Lorimer* claims that the Statute had run against the rightful owner. The question of adverse or non-adverse possession is not

(a) 18 Gr. 532.

(c) 3 U. C. R. 423.

(e) 27 U. C. C. P. 257.

(g) 18 Gr. 367.

(b) 3 U. C. R. 486.

(d) 5 U. C. R. 602.

(f) 8 U. C. R. 388.

(h) 10 Gr. 157.

Workman
v.
Robb.

Argument.

very well settled: *Kipp v. The Synod of Toronto* (a), 1881.
Foster v. Emerson (b). *Samuel Lorimer* went into pos-
 session as a tenant from year to year, not at will; and
 the rent, it is shewn, was to be paid by improvements,
 or more strictly speaking, improvements were to be
 made in lieu of rent. *Truesdell v. Cook* (c) is not at
 all at variance with this. Here every fresh improve-
 ment as made was a fresh payment of rent, and thus
 the title of *Robert* was kept alive.

Workman
 v.
 Robb.

No one appeared for the defendant *James Lorimer*,
 against whom the bill had been taken *pro confesso*.

PROUDFOOT, V. C.—The plaintiffs, who are the exe- April 2nd.
 cutor and executrix of *Hugh Workman*, by this bill
 say that *Samuel Lorimer* on the 4th June, 1864, pur-
 ported to convey the lands in question to the defen-
 dant *Robb* absolutely in fee, but that *Lorimer* received
 no consideration, or if he got any it has long since
 been repaid, and that *Robb* holds the lands as trustee Judgment.
 for *Lorimer*. That *Samuel Lorimer* has ever since
 1864 occupied the lands and has never in any way
 acknowledged the title of *Robb*, and has acquired a
 title under the Statute of Limitations. That in the
 middle of January, 1880, *Samuel Lorimer*, with the
 intent and for the purpose of defeating, delaying, or
 hindering the plaintiffs of their just debts made a
 fraudulent attornment to *Robb*, and placed *James*
Lorimer, his son, in possession of the land. That
James Lorimer pretended to be entitled as tenant of
Robb, but really occupies the same by virtue of some
 arrangement with *Samuel Lorimer*. That on 1st
 April, 1880, the plaintiffs filed their bill against
Samuel Lorimer and *Robb*, praying that a conveyance
 of lands (other) by *Samuel* to *Robb* might be set aside

(a) 33 U. C. R. 220.

(b) 5 Gr. 134.

(c) 18 Gr. 532.

1881. as fraudulent as against the plaintiffs. That on 2nd June, 1880, a decree was made in that suit setting aside the conveyance and ordering *Samuel Lorimer* to pay the costs, which have been taxed at \$75.88, and writs of *fi. fa.* against the goods and lands of *Samuel Lorimer* have been placed in the hands of the proper sheriff. That on 4th October, 1880, the plaintiffs recovered a judgment in the Common Pleas against *Samuel Lorimer* for \$344.15, and have placed like writs in the hands of the sheriff.

Workman
v.
Robb.

Judgment.

The defendant *Robb* answers, alleging that he was mortgagee of the land in question under a mortgage made to him by *Samuel Lorimer*, in September, 1862, for securing payment of \$500 and interest at ten per cent, on 1st February, 1864, which was money advanced by *Robb*, to pay the purchase money for the premises. That *Samuel Lorimer* became further indebted to him, and on 4th June, 1864, conveyed to *Robb* the equity of redemption in the premises for \$1,000, the amount of the mortgage and further debt, who went into possession of the premises, while *Lorimer* went to Michigan. *Robb*, in 1866, leased the premises to a coal oil company, who tested for oil and did not succeed in finding any, but struck a living stream of water that flowed from the test well. Soon after this, and in 1867, *Samuel* returned and said he thought he could use the water power to some purpose if *Robb* would rent the premises to him. *Robb* told him he might go on and occupy them and make such improvements as were necessary and he would pay him for them. *Lorimer* went into possession and erected a small carpenter's shop in 1868, and added to it in 1869, and ditched and drained the premises, and afterwards built a kiln for drying lumber. *Robb* looked upon him as tenant at will or during pleasure. That in 1879 *Samuel* told *Robb* he intended to remove to Brantford to carry on his business as a builder, and *Robb* rented the place to *James Lorimer* for three years, from 1st January, 1880,

for \$100 a year, and he has gone into possession. *Robb* denies fraud, and claims to be owner in fee.

1881.

Workman
v.
Robb.

James Lorimer by his answer claims to be tenant to *Robb* under that lease; denies occupying under any arrangement with *Samuel*; and asserts that save as to this he is a stranger to the matters in the bill.

The bill is *pro confesso* against *Samuel Lorimer*.

At the hearing the evidence satisfactorily established that *Robb* was originally a mortgagee of *Samuel Lorimer* to secure money advanced to pay the purchase money of the property. That he became a creditor to a considerable amount afterwards, and that in 1864 the equity of redemption was released to him in satisfaction of the indebtedness. That it was a fair transaction for a reasonable price. That *Samuel* immediately went to Michigan, and on his return in 1867, found that the result of testing for oil was to produce a stream of water that might be utilized for the driving of machinery in his business as a carpenter and builder. That the overflow of water had rendered the ground marshy and it would have to be drained. That he applied to *Robb* for leave to occupy these premises, which was granted. He was to improve the place—the rent was to be paid in improvements. He was to give up the place whenever *Robb* wanted it. He built a dam and tail race. After this he put up a workshop and made several additions—enlarged four times, the last in 1879. The improvements have cost \$500, which would be a fair rent, and they were all made after consultation with the landlord. In 1879 *Samuel* intended to go to Brantford to carry on business as a builder, and told *Robb* he would not want the place any longer, who agreed to take it off his hands. *Samuel*, in pursuance of this intention, took a contract to build a house for one *P. Woods*, and to procure lumber and material for the work got *Robb* to indorse a note for him. The building operations turned out unfortunate, and *Lorimer* incurred a loss

Judgment

1881. of \$1,000, which was the whole of his indebtedness. When *Samuel* gave up the place in 1879, it was leased verbally to *James*, the rent to begin in January, 1880, and in September, 1880, a written lease for three years was made to him. He had paid one year's rent.

Workman
v.
Robb.

There is no relationship between *Robb*, who is an Irishman, and the *Lorimers*, who are Scotch, and no business connection save what has been detailed.

The deed made by *Lorimer*, which was set aside in the other suit, was never accepted by *Robb*, who refused to have anything to do with it.

The suit entirely fails in so far as it rests on the alleged questionable nature of the original transactions between *Robb* and *Samuel*.

But it was contended that *Samuel* had acquired a title by occupancy, and that the attornment, as it is called, though there was no attornment in fact, was made under such circumstances as to be a fraud on the plaintiffs.

Judgment.

I do not think that the plaintiffs are in a position to attack the arrangement. *Samuel* gave up possession of the premises as early as June, 1879, when he made over the machinery to his son. It was not till in or after June, 1880, that the costs were taxed in the other Chancery suit, and not till October, 1880, that the judgment was recovered in the Common Pleas. No debt was in existence save what arose from the unfortunate building contract, and the place was given up before or at the time when this was entered upon. It is denied in fact, and it is not likely in speculation, that this contract was entered into with a view of a loss being incurred, and that the dealings took place in order to avoid the anticipated consequences. *Robb* never claimed anything under the deed that was set aside, and ought not to be prejudiced by any proceedings in that suit. The plaintiffs are therefore in the position of subsequent creditors, and not claiming any advantage from there being any prior creditors.

For the same reasons there would not seem to be any fraud in the dealings between *Robb* and *Samuel* to the injury of the plaintiffs.

1881.
Workman
v.
Robb.

But supposing a different view to be taken of the plaintiffs' position, it would still have to be ascertained whether the statute of limitations applied at all; and that would involve the question whether *Samuel* was tenant to *Robb* under a rent of which payments were made within the ten years; and a further question, whether supposing *Samuel* to have been in possession of *Robb's* property for ten years without paying rent he is compelled to assert a title under the statute, and thus to deprive *Robb* of his property without consideration.

I think that a tenancy was created between *Robb* and *Samuel* in 1867—a tenancy which *Robb* says in his answer he looked upon as a tenancy at will or during pleasure. It is probable that the facts would have justified *Robb* in claiming *Lorimer* to be his tenant under another character than as tenant at will, but he has chosen to claim it as a tenancy of that kind, and his right must be determined upon that basis.

Judgment.

In ordinary circumstances the tenancy at will terminates at the end of a year from its commencement, R. S. O. ch. 108, sec. 7, and *Keffer v. Keffer* (a), was relied on by the plaintiffs as shewing that when the statute began to run by the expiration of a year from the tenancy, it would not be stopped by the parties dealing with it as a subsisting tenancy. The case of *Foster v. Emerson* (b) is at variance with *Keffer v. Keffer*, and in this Court at least is binding until reversed, or until contrary law is established by the Court of Appeal.

But I do not feel under any difficulty in holding that, in any way of considering it, *Keffer v. Keffer* does not govern this case, because the circumstances are widely different. In that case there was no original

(a) 27 C. P. 257.

(b) 5 Grant, 135.

1881. tenancy at all, except by construction; there was no agreement for payment, and there was no receipt of rent. The father placed his son on the property to make a living there. The property was intended to be the son's after the father's death, and the son entered under the expectation that it was to be his, and he would not otherwise have gone into possession.

Workman
v.
Robb.

None of these things exist here. There was an original tenancy by agreement, to terminate when the landlord chose: rent was to be paid, and was paid, and there was no intention that the land should belong to the tenant.

Judgment.

In *Day v. Day* (a), quoted in 27 C. P. 279, 282, Sir Joseph Napier delivering the judgment of the Privy Council, says: "When the statute has once begun to run it would seem, on principle, that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will." And in *Keffer v. Keffer*, (page 288), *Hagarty*, C. J., says: "The bar under the act must prevail, unless there has been not merely a determination of the original will, and a mere continuance in possession on sufferance, but some evidence from which it can fairly be held that a new tenancy at will was created between them." Quite in accordance with these expressions is the language of this Court in *Foster v. Emerson* (b): "When a tenancy at will has been created, and there are no subsequent dealings between the parties, there the statute determines the tenancy at the expiration of a year, and the period of limitation pre-

(a) L. R. 3 P. C. 571.

(b) 5 Gr. p. 143.

scribed by the statute begins to run from that time. That is quite consistent with reason. But when both landlord and tenant deal with it after the expiration of the year as a subsisting tenancy it is no longer possible for either, consistently with reason, to rely on the statutory determination. The tenancy cannot be at one and the same time a subsisting and a determined tenancy; and when the parties deal with it as subsisting, they can no longer contend that it is determined by the statute."

1881.

Workman
v.
Robb.

In *Truesdell v. Cook* (a) there was no tenancy by agreement, the contention was, that the occupant was in possession as a mere caretaker or servant of the plaintiff, which it was decided that the evidence did not sustain, but that a tenancy at will was constructively created, which was terminated by the statute at the end of a year, and there were no acts from which a new tenancy could be inferred.

Cooper v. Hamilton (b) does not establish anything not already established in *Keffer v. Keffer*.

Judgment.

In the case before me the improvements were made from time to time after consulting with and obtaining the consent of the landlord, which was acting under the original agreement, for the improvements were to be allowed for as rent, and it was therefore proper to ascertain that they were such as the landlord would choose to allow. Every successive improvement, therefore, was a payment of rent, and the improvements continued to be made down to 1879. There was no pretence that they were made in the exercise of ownership. If the statute is to be held to have determined the original tenancy at the end of a year, then at the time when any new improvement was made by such an arrangement between the parties, there was the creation of a new tenancy at will. The evidence in my opinion is amply sufficient to justify this conclusion. Upon this ground also the plaintiffs fail.

(a) 18 Grant 532.

(b) 45 U. C. R. 502.

1881.

Workman
v.
Robb,

Judgment.

But I consider the defendants are entitled to judgment also because the tenant is not bound to take advantage of the statute. Statutes of limitation are enacted from principles of public policy, and like all general rules, in conferring a public benefit, not seldom inflict grievous private wrong. In this sense they are said to be contrary to natural equity. There can be nothing more contrary to natural equity than that a person who has succeeded in remaining in possession for ten years of another man's land should acquire a right to it without giving any equivalent. An honest man would say in such a case, I have no right to this property; and he would hasten to restore it on the first request. And the statute does not compel him to do a dishonest act. Nor is the case varied because he may have creditors. The statute that enables creditors to reach property over which the debtor can exercise a power for his own benefit, has been construed to apply only to a power he can *honestly* exercise. *Beavan v. Oxford (a)*, *May* on Fraud. Con. 213. If the occupant had really claimed the benefit of the statute,—had resisted any attempt to oust him—or in any other mode had evinced his intention to assert a title, any disposition he might make of it would be subject to his creditors, just as any other property to which he had an unquestionable title. But that is not the case here.

In *Sanders v. Sanders (b)*, it was held that payments of rent after being twenty years in possession prevented the operation of the statute. *Malins*, V.C., said, "Where the statute has run in favour of one party, and he in whose favour it has run chooses to disavow the benefit, the benefit is at an end. It is a bar for those who desire it to be a bar, and for no others."

The bill in this case only seeks relief against the property, and must be dismissed with costs. *Samuel*

(a) 6 D. M. & G., at 521.

(b) 29 W. R. 413.

Lorimer has suffered the bill to be taken *pro confesso*, and had any specific relief been sought against him, it would probably have been granted. But the bill fails on the only ground on which relief is asked, and it will be dismissed generally.

1881.
Workman
v.
Robb.

THOMSON V. TORRANCE ET AL.

Mental capacity—Testamentary capacity—Will obtained by interrogation—Mortmain Acts.

The testator, a man of education, had become so weakened by illness as to be confined to his bed for sometime prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were obtained by the person preparing it by putting questions to the testator as to the disposition of his different properties; such will when drawn having been read over to the testator clause by clause, who expressed his assent to some of them while as to others he made intelligent remarks and some changes in the provisions thereof. The Court [BLAKE, V. C.,] in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate; although it was shewn that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act—that there was no intention on his part to make a will—that he was a man who, when in possession of his mental faculties, was not likely to take suggestions from others—that not a single devise originated with the deceased—that the author of the will did not know what property the deceased had—that he admitted that if he had had this knowledge he would have spoken to him seriously on the subject of his relations, of whom there were several—that the will was inofficious—that the testator was 84—that it took two hours to prepare the will, although it covered but one foolscap sheet—and that they sent for and obtained the numbers of the lots from a neighbour, thus shewing that they could not obtain it from the deceased.

The residuary estate consisted of mortgages, the bequest of which, under the Mortmain Act, was declared invalid, and to belong to the next of kin of the testator, the plaintiff in the suit.

1881.

Thomson
v.
Torrance
et al.

This was a bill filed by *Annie Thomson* against the Reverend *Robert Torrance*, *James Loghrin*, *John A. Armstrong*, *Esther Argo*, *Agnes Strachan*, The Reverend *William Reid*, and *Knox College*, setting forth that the plaintiff was the only sister and sole heiress-at-law and next of kin of the late Reverend Doctor *William Barrie*, who was a minister of the Presbyterian Church in Canada, and who died at Guelph, on the 28th of July, 1879, entitled to certain valuable real and personal property: that about two days before his death, when he was very weak in body and in the extremity of illness, and incapable of writing or speaking intelligibly, and wholly ignorant of and unable to understand what he was asked to do, the defendant *Torrance*, of his own motion, prepared and procured the said Dr. *Barrie* to apply or fix his mark, a long straight line, to a written instrument, purporting to be his last will and testament, which was in the words and figures following:

Statement.

"This is the last will and testament of me, *William Barrie*, D.D., of the city of Guelph, in the county of Wellington, and Province of Ontario and Dominion of Canada, minister of the Presbyterian Church in Canada. Firstly, I hereby revoke all former wills and codicils by me previously executed, and all writings whatsoever of that nature and whensoever made.

"Secondly—I hereby appoint my friends, the Reverend *Robert Torrance*, of the city of Guelph, Mr. *James Loghrin*, and Mr. *John A. Armstrong*, executors of this my last will and testament, and trustees of all my estate, real and personal, of whatever description and wheresoever situated, with power to dispose thereof according to the provisions herein set forth.

"Thirdly—I direct my said executors to pay all my just debts, and defray all my funeral and testamentary expenses out of my estate, willing that my personal estate be first exhausted.

"Fourthly—I bequeath to my housekeeper, Miss *Esther Argo*, on account of the long and faithful service she has rendered me, the house and lot I own and occupy in the city of Guelph, being parts of Nos. 21 and 22 on Kirkland Street, Judge *Macdonald's* survey, in the said city, for her sole use and benefit, on condition of her remaining with me to the end of my life.

"Fifthly—I will and bequeath to my cousin, *Agnes Strachan*, of Gateside, Strathnigh, Fifeshire, Scotland, the sum of \$200 of lawful

money of Canada for her sole use and benefit, and direct my executors to forward the same to her through the Rev. Mr. Milne, of Gateside, or to any one appointed by her to act as her trustee.

"Sixthly—I will and direct that the residue of my personal estate, after meeting and satisfying all claims, be divided in equal proportions between the Home Foreign Mission Funds of the Presbyterian Church in Canada, the Endowment Fund of Knox College, situated in the city of Toronto, and connected with the same Church.

"Seventhly—In addition to the house and lot previously bequeathed to my housekeeper, Miss Argo, I give her all my furniture, books and other effects, to be kept by herself, or disposed of according to her discretion."

1881.

Thomson
v.
Torrance
et al.

And praying, under the circumstances therein stated, and which are fully detailed in the judgment, (1) that this Court might declare that the said alleged will was not the last will and testament of the said Dr. Barrie, and that he died intestate; (2) that probate thereof should be refused, and that administration of his estate might be committed to some proper person; (3) that in any event it should be declared that the said alleged will, as to such parts of the said estate as consisted of mortgages of lands and other property not pure personalty, should be declared void under the Statutes of Mortmain, and that as to those the said Barrie had died intestate; and for further and other relief.

The defendant Reid, it was alleged, was the Moderator of the Presbyterian Church in Canada, and the treasurer of all the mission funds of the said Church, and was the proper person to represent such funds.

The defendants other than Reid and Knox College answered the bill, denying the allegations therein as to the mental incapacity of the testator.

The cause came on for the examination of witnesses at the sittings of the Court at Guelph. The material portions of their testimony are stated in the judgment.

In the course of the evidence two letters were put in and proved, which are referred to in the judgment, written by the defendant Argo, which were as follows:



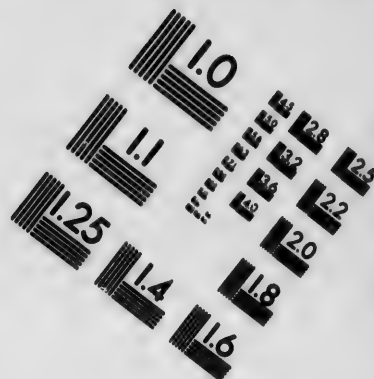
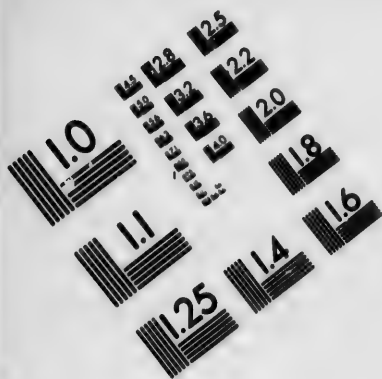
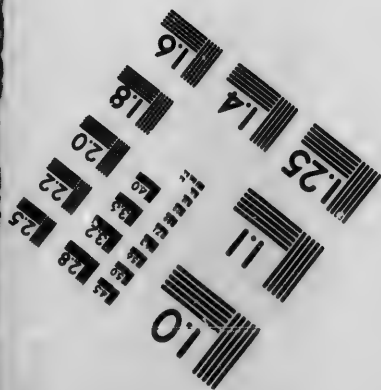
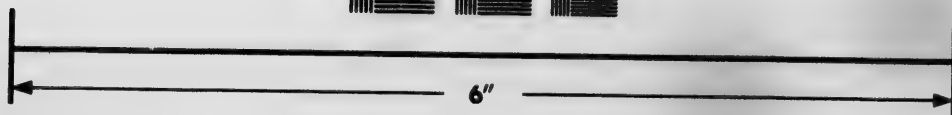
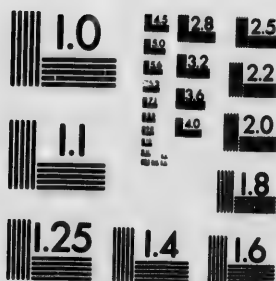


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1881.

Thomson
v.
Torrance
et al.

GUELPH, Monday morning.
DEAR FRIEND,—You will be glad to hear that Dr. *Barrie* has improved very much since you saw him. He had a pretty good night's rest on Saturday night, and told all who called to see him yesterday that he felt as well as ever he did in his life—only very weak. He did not rest so well last night, but I think he over exerted himself by talking and walking in the garden too much. The doctor says if he will only keep quiet and take good care of himself he will soon be all right again. His appetite is good; I had to give him his porridge before six this morning. Mr. *Mitchell* is also a good deal better.

Yours truly,

E. ARGO.

Thursday morning.

Statement.

DEAR MRS. MITCHELL,—You will be wearying to hear of Dr. *Barrie* again. I am sorry to say that I have not such good news to give you this time. He took a bad turn last night, and has never rallied since. He had been up every day and able to go about, but could get very little sleep. The doctor gave him medicine to cause him to sleep, but it had the opposite effect, and he was for several hours quite delirious, but is now sleeping calmly, though at times in great distress. We had hope that he might be spared a little longer in the world, but that hope is almost extinguished. He thought himself that he would get over it; but I do hope he may be able to speak a word to us before he leaves us to be forever with the Lord.

Yours in haste,

ESTHER ARGO.

Mr. *C. Robinson*, Q.C., Mr. *Guthrie*, Q.C., and Mr. *Moss*, for the plaintiff.

Mr. *Boyd*, Q.C., for defendants *Argo* and *Strachan*.

Mr. *J. Bain*, for defendant *Reid*.

Mr. *Mortimer Clark*, for *Knox College*.

Mr. *K. McLean*, for the executors.

The points relied on and authorities cited by counsel appear in the judgment.

March 28rd.

BLAKE, V. C.—By the bill in this cause the plaintiff alleges that she is the sister and sole heiress-at-law, and next of kin of the late Rev. Dr. *Barrie*, who died at Guelph, on or about the 28th July, 1879, entitled to personal property worth from \$10,000 to \$12,000, and a

1881.

Thomson
v.
Torrance
et al.

house and lot in Guelph; that "about two days before the death of the Rev. Dr. *Barrie*, and while he was very weak in body, and was in the extremity of illness, and incapable of writing or of speaking intelligibly, and was utterly ignorant of and unable to understand what he was asked to do, the defendant, the Rev. *Robert Torrance*, of his own motion prepared, and procured the said Dr. *Barrie*, to affix a mark or long straight line to a written instrument purporting to be the last will and testament of him the said Dr. *Barrie*": that although she is the only sister of Dr. *Barrie*, and they were always on good terms, and she in comparatively poor circumstances, and he well off and without wife, or brother, or other sister, nothing was left to her by the will: that Dr. *Barrie* was at the time of his death over eighty years of age, and at the time when the alleged will was said to be executed was confined to bed and had not power of mind or body to converse or decide upon matters of business, and was unable to write or speak so as to be understood, and he was incapable of comprehending the contents of the paper from mental and physical exhaustion; and that the same was obtained by undue influence: that the fact of the illness of Dr. *Barrie* was concealed by *Esther Argo* the housekeeper from the plaintiff, that in any event the residuary devises are void under the Statute of Mortmain.

Judgment.

The persons named as executors by the will applied to the Surrogate Court in the County of Wellington for probate, whereupon the plaintiff lodged a caveat, and, after some evidence had been taken this Court removed the matter here for adjudication, and ordered a bill to be filed to raise the questions on which the plaintiff sought to contest the will.

In answer to this bill the College and Dr. *Reid*, the Moderator of the Presbyterian Church in Canada, submitted their rights to the Court. The other defendants answered, denying the incapacity of Dr. *Barrie*

1881.
 Thomson
 v.
 Torrance
 et al.

to make the will in question, and stating that Mr. *Torrance* of his own motion prepared and procured Dr. *Barrie* to execute the same; that it was made in pursuance of the expressed intention of Dr. *Barrie* for years before: that the plaintiff and her family took but little interest in the welfare of Dr. *Barrie*, nor did the plaintiff shew him that kindness which a sister usually shews to a brother who is alone in the world, and with none but strangers to take care of him: that he never intended that the plaintiff and her family, who were comfortably off, should get any of his property: that no undue influence was used by Mr. *Torrance* or any one else in the procuring the said will: that the fact of the illness was not concealed, but "the plaintiff had no desire to take care of or nurse the said Dr. *Barrie* in his last illness, and came to look after his property, and not to attend to his comfort or alleviate his sufferings on his death bed."

Judgment. By way of cross-relief the defendants asked the Court to declare this to be the last will and testament of the deceased.

Some evidence was taken in the Surrogate Court, and after that before the Master of this Court at Guelph, and a good deal more was taken at the examination in term before me. On the conclusion of the evidence I formed a very strong opinion upon the case, since which time it has been argued, and I have read over the evidence very carefully and have made the following synopsis of what appears to me to be the important portions of the testimony given.

Mr. *Torrance* testifies, I lived in Guelph over thirty-three years, and knew Dr. *Barrie* rather better than thirty-three years; he came to Guelph about two years before he died, and purchased the house and lot there about twelve months before his death; he was in bed a week before his death, and had ceased from active duty about two years before he died. Dr. *Barrie* died on Monday. I visited him the preceding Thursday, the

24th of July, about six p.m., and remained a short time and returned about eight a.m. the day following, when Dr. *Herod* asked me if I knew whether or not a will had been made, when I said I did not know, that perhaps Miss *Argo* might. She said she could not tell. It did not occur to me to ask Dr. *Barrie*, as I never interfere with other people's affairs unless I am asked to. I left and did not return until three the same afternoon, when I met *John Armstrong* and had prayer in the bedroom with the doctor. I asked him if he heard when I had done and he said he did. Dr. *Smith* came in just before I left, after the prayer. I had heard shortly after I went in the afternoon that Dr. *Herod* had asked Dr. *Barrie* and found out there was no will. I next saw Dr. *Herod* that evening in his own home. I got to Dr. *Barrie's* about seven that evening. I wished to see Dr. *Herod*; as he had initiated the making of the will I thought he wished to be there. I took tea at Dr. *Herod's*, and when I had nearly finished Dr. *Herod* got up and said he would go over to Dr. *Barrie* and use the catheter and give him some relief and come back for me. I waited for Dr. *Herod* and as he did not come, I returned to Dr. *Barrie*, passing Dr. *Herod* on the way, and after some delay at Dr. *Barrie's* and sending for Dr. *Herod*, he returned a message that there was no need for his coming as the will could be made perfectly without him. I then asked for paper, and I asked *Alexander Gow* if he would draw the will and he declined, and I then asked Mr. *Davidson* and he declined, and I then proceeded to draw it. I went in to Dr. *Barrie* and asked him if he remembered what Dr. *Herod* had said, and he answered perfectly well, and I asked him if he would like to have his will drawn, and I got the paper and wrote the first two sentences. I then asked him, who do you appoint your executors, and he said: I appoint *Robert Torrance*. I asked him if he would give me Mr. *Loghrin*, and he said yes, and Mr. *Gow*

1881.
Thomson
v.
Torrance
et al.

Judgment.

1881. asked him if he would name Mr. *Armstrong*, and he said: Yes. When Miss *Argo* had left the room, I asked him about the house and lot, knowing he intended it for her. When I first spoke to him about this he said "That is the drawback." I suggested the leaving of the house to Miss *Argo* as she had served him well, and I had heard he intended to leave it to her. He said: "I will leave it to her if she bide with me to the end of the chapter." That was a characteristic expression of Dr. *Barrie's*. I got the numbers of the lots from Mr. *Hicks* when I was making the will. I did not know the doctor would know them as well as he. It took fifteen or twenty minutes, or more, to get these numbers. I asked him next what he would do with the rest of his property. He seemed to be some little time considering. Miss *Argo* suggested he should leave it to his sister in *Garafraxa*. He said, 'No,' very positively. Miss *Argo* then mentioned Mrs. *Mitchell*, his niece, daughter-in-law of Mrs. Thomson. He said: 'They have no need of it.' She mentioned to him that they had a large family of daughters, and that they were endeavouring to educate some of them to be teachers, and one of them was called after him, and would he not leave them something, and he said: He would not. Then there were the friends in New York a Miss *Strachan*; Miss *Argo* mentioned them to him or to me, and I mentioned them to him. Two daughters, of *John Strachan*, whose father he was very fond of. He said: They can work for themselves. Then I mentioned this relative in the old country, and said: Haven't you a friend in Scotland that would be the better of some help, *Agnes Strachan*? I mentioned a sum, if he would leave her \$200 or \$400. Mr. *Gow* suggested that he should make the sum £100 sterling.

Judgment.

I understood he assented to this, and I went and wrote this clause and returned. I asked him if he would give the rest to the schemes of the church. I

1881.
Thomson
v.
Torrance
et al.

1881.

Thomson
v.
Torranoe
et al.

understood that the church was to get what he had when he died. I first asked him what he would do with the rest of his property, and he made no answer, and then Mrs. *Armstrong* said he intended it for the church; and then I said: 'Will you leave it to the church.' He seemed to be considering when I first spoke to him, and when he made no answer Mrs. *Armstrong* said: He had always been a friend of the Home Mission and the Bible Society. I asked him if he would leave it to the Bible Society, and his reply was, it is prospering. Then Mr. *Gow* asked him if he would leave some to the general hospital, and he assented to this but afterwards withdrew it. *Gow* named \$100. He said yes, at first, but then said no, he would not give anything. I then went over the schemes of the church to him—I had gone over them before to him. I had mentioned that the Home Mission Fund was in difficulties, and that it was in need of some relief. I then went over them a second time. He knew the schemes of the church. I think, although I am not very positive, that he then stated he would give it to the Home Mission Fund, and the Foreign Mission Fund, and the endowment of Knox College. I am pretty certain he picked out these church schemes himself. I asked him if he would leave the rest in equal proportions to the church, and he mentioned these three matters. Then Mr. *Davidson* said to me that there was nothing mentioned about the furniture or the books. I got no direct suggestion from him as to the mode of leaving his property. It was all by suggestion to him. When I asked the doctor what he would do with his furniture, I followed it up by saying will you leave it to the *Argo*, and he said yes. I then went and wrote that clause and returned with the will, taking *Walter Scott* and Mr. *Davidson* into the room with me. I said, here is the will, shall I read it over to you, doctor; and he inclined and paid attention, and I read it over sentence by sen-

Judgment.

1881.

Thomson
v.
Torrence
et al.

Judgment.

tence. I think he was lying on his back. He was weary: he seemed to be weary from sickness. He had fallen into a doze at the time, we were arranging the clause giving the property to Miss *Argo*; I think we had to arouse him. Between each clause he had fallen into a sort of doze. This took an hour and a half or more. He seemed wearier at the end than the beginning of it. When I read the first clause over I asked him if he heard it, and he said yes, perfectly, that is correct; and I did so at every clause. When I came to the clause about *Agnes Strachan* he objected to the \$500. He made some demur, and I asked him if it was too much. I said, shall I make it \$200 or \$400, and he said \$200. He did not use the words \$200; I said \$200 and he said yes. There is not a devise or devisee in the will suggested, by himself—all in answer to suggestions. I think he was perfectly capable of telling me what he wanted. On Friday morning he was recovering from a very severe attack. I saw nothing on Friday, to shew that he was not able to make a will. From my own personal knowledge, I know nothing of the terms on which Dr. *Barrie* lived with his sister the plaintiff. The statements in my answer I made on the information of *Armstrong* as to the plaintiff and the *Mitchells* and their relationship with the deceased. It never occurred to me to send for his sister at the time. I returned on Saturday morning. He was fresher and stronger than on Friday. I remained about an hour and went away and returned about the middle of the day, and I then helped him out of bed. I saw him on Sunday evening. I am not positive of his state of mind after Saturday. When I was making the will I did not know what property he had—I did not seek to find out. I thought he might have \$2,000 and the lot. It now turns out his property is worth about \$10,000 and the lot is worth about \$1,450. I remember when Dr. *Smith* was there, suggesting he was in too much

1880.

Thomson
v.
Torrance
et al.

pain, and that he had better not have prayer. If I had known what his property was, I think I would have taken the liberty of mentioning his friends and asking him if he thought it right not to leave them any. I don't know that it would have influenced Dr. *Barrie's* mind—he was a man of strong determination. I did not tell Mrs. *Thomson* or Mrs. *Mitchell* that a will had been made. I don't think I mentioned the making of the will until after the funeral. I found he was so weak and tremulous when he went to sign his will, and his hand was so large that I could not grasp and guide it, and so I suggested to him that he should make his mark. His hand had trembled for years. It was Dr. *Herod* that proposed the will should be made. When the names of Mrs. *Thomson* and Mrs. *Mitchell* and the other relatives were mentioned, he answered in a very determined manner. You could not persuade Dr. *Barrie*—you could scarcely make him change his mind. On Dr. *Herod* asking Miss *Argo* she refused to go in and ask Dr. *Barrie* if he had a will made.

Judgment.

Miss *Argo*.—I don't think Dr. *Barrie* went once a year to see Mrs. *Thomson*. He got ill about seven weeks before his death. The doctor did not tell me how it was likely to terminate until a day or two before his death—not till the Friday before his death. Mrs. *Mitchell* asked me to write in the beginning of the week how he was, and I did. I had seen her the Saturday before the will was made, and on the Tuesday I wrote and told her he was better. I wrote again in the forenoon of Friday (a). He had been up on the Monday and in bed on Tuesday. On Friday morning the doctor told me he was not likely to recover. In the forenoon of Friday Dr. *Herod* said something about a will. He asked me if I knew whether Dr. *Barrie* had made a will and settled his affairs. It was arranged that Mr. *Torrance* was to draw the will, and it was after that I wrote the letter. I had no reason

(a) See letters at p. 256, dated Monday and Thursday.

1880.

Thomson
v.
Torrance
et al.

to think he was not in a state that day to make a will, although at times he suffered more than at others. He was much better at the time he was making the will. When he was not taking notice he had his eyes closed a good deal of the time. He seemed to be dozing most of the time. He spoke to Mr. *Walter Scott* when he came in. I heard Dr. *Herod* say to Dr. *Barrie* in the forenoon of Friday that he was very ill and might not recover, and that if he wished to settle his affairs he had better do it as soon as possible. Dr. *Barrie* said he wished for Mr. *Torrance*. I think Dr. *Herod* asked him if he would like to see Mr. *Torrance*, and he said yes. I think when Mr. *Torrance* came in the evening he asked Dr. *Barrie* if he remembered what Dr. *Herod* had been saying to him. I was in and out and did not hear all that passed. Mr. *Torrance* asked Dr. *Barrie* how he would dispose of his property. Mr. *Torrance* asked me about his sister—about his friends. He said I should know better than he did about them.

Judgment.

I told him Dr. *Barrie* had a sister. I mentioned the other friends—the *Mitchells*. I said they had a large family of daughters, and one of them was called after him. He said they did not need it. I mentioned Miss *Strachan's* name because I knew she was in poor circumstances. I told Mr. *Torrance* this, and that Dr. *Barrie* had a letter from her a short time before. He asked him if he would leave her anything—£100. I think he said yes. Mr. *Torrance* then wrote this down. He next spoke about the mission cause, then about Knox College. Mr. *Torrance* mentioned the Home and Foreign Mission Fund, Knox College, I think, and the Bible Society Fund. I think he said the Bible Society was prospering. The will was brought in and read before it was signed. He read it clause by clause. Dr. *Barrie* spoke at the end of each—he said yes. At the end of the first clause he said he would leave me the house if I would abide with him to the end of the chapter—that was the clause

1881.

Thomson
v.
Torrance
et al.

about giving the house to me. I did not know what he was going to do with it—others had said he was going to give it to me. He said but little till he came to Miss *Strachan*. He did not assent to this, and Mr. *Torrance* asked him if it was too much, and he said yes, and Mr. *Torrance* asked if \$200 would be enough, and I think he said yes, that would do. When the other clauses were read over Dr. *Barrie* said yes, or that would do, or that is right. He had often told me that I would have the disposal of his books when he was gone. He told me when he was ill before that I should give them to any one that would like a book as a keepsake. Mr. *Torrance* may have been there two hours. When it was all over he took my hand and thanked me for what I had done for him. When you spoke to him he seemed to take notice of you at once. I think he did not take notice until you spoke. Sometimes the eyes were closed; sometimes they were opened. I recollect Mrs. *Mitchell* coming on the Sunday. I did not think of telling her anything about this will. Mr. and Mrs. *Auld* knew it had been made. I never spoke to any one about it that did not speak to me. Dr. *Barrie* seemed much better on the Friday than he was on the Thursday. He was easier, not suffering so much pain, but I did not think he was recovering for all that. I intended to tell the truth when I wrote this letter to Mrs. *Mitchell*. Dr. *Barrie* did not rally before his death. Mrs. *Thomson* did not shew any concern for him. She said nothing about his property to me. She seldom came to see him. Mrs. *Mitchell* and the members of her family came to see him sometimes. I have lived thirteen years with Dr. *Barrie*, and during that time Mrs. *Thomson* came to see him twice. One of the sons was married without telling Dr. *Barrie*. He said he was not going to the marriage of the youngest son. Mrs. *Mitchell* is a daughter of Mrs. *Thomson*, and she knew the week before that he was sick, and could

Judgment.

1881.
Thomson
v.
Torrance
et al.

have told her mother. I never spoke to Dr. *Barrie* about making a will. Dr. *Herod* first mentioned it. I had heard him say before he would like to leave something to the church. Some years before he said he had heard I was going to leave him, and he said, if I would remain with him as long as he lived he would see me comfortably off. When Miss *Strachan's* name was mentioned, Dr. *Barrie* said: "Poor creature, she is in poor circumstances, I must send her something." The medicine given Dr. *Barrie* before Thursday, was an aperient. They then changed the medicine and it made him restless. He did not recover until Thursday evening. My meaning in the letter I wrote was, that the Doctor would say something about his death. We were anxious about this; something about his feelings; about religious comfort. When he was asked if he would leave anything to Mrs. *Thomson*, he said no, as if he meant it: he seemed determined. When Mrs. *Mitchell's* name was mentioned, he said, I think they do not need it. I spoke about their large family. Dr. *Barrie* understood perfectly what he was doing. I have no doubt whatever in making the will, he understood perfectly what he was doing. When Dr. *Herod* mentioned to Dr. *Barrie* about the will, Dr. *Barrie* said in a loud distinct voice: "Many thanks to you Doctor for mentioning it to me." I never had any difficulty in speaking to him.

Judgment.

John A. Davidson.—I went to Dr. *Barrie's* about eight o'clock on Friday evening. The will was begun between nine and ten. Mr. *Torrance* read the will. I was called in when it was being read. There were then present Mr. *Torrance*, Mr. *Gow*, Mrs. *Armstrong*, myself, and Mr. *Scott*. The drawing of the will took from one hour and a quarter to one hour and a half. The first remark I remember was, Mr. *Torrance* asked him about the house. I think Dr. *Barrie* said that was for Miss *Argo* if she bided with

1881.

Thomson
v.
Torrance
et al.

him to the end of the chapter. Mr. *Torrance* asked him what he would leave Mrs. *Thomson*, and he said she had enough; also, Mrs. *Mitchell*. I paid attention because Mr. *Torrance* asked me if I would be a witness. The doctor said she had just about enough. Mr. *Gow* asked him to leave something to the General Hospital, as he had always been a great friend to it. He first signified his intention of doing so, but after he said he would not. Mr. *Torrance* got his answer to each question and put it down. When the will was read over, I think Dr. *Barrie* said yes at the end of each sentence, except when he came to the \$500, and several sums were mentioned, and it was made \$200. I do not know but that he would have written his name if they had let him, but Mr. *Torrance* said his mark would do as well. I had a long talk with Dr. *Barrie* the week before the will was made. His memory, I thought, was good. I did not hear about the will until Friday night. I went for Dr. *Herod* to come, but he said it was not necessary for him to come, that Mr. *Torrance* could write the will as well as he could. In my opinion, Dr. *Barrie* understood the questions that were put to him. The will was read over slowly. At the end of each sentence or division, Mr. *Torrance* asked if that was correct, and waited until he got an answer. I have no doubt Dr. *Barrie* understood what was going on, and assented to it intelligently. On Saturday evening I was in the room and Dr. *Barrie* knew me and spoke to me, and shook hands with me. He spoke very plainly. He said he was very low. He was a little eccentric—of more than ordinary ability—a man of strong mind. On the Saturday he called me by my name. He was a man of warm attachments.

Judgment.

Walter Scott.—I came to Dr. *Barrie's* house about eight of the Friday night before he died. Miss *Argo* told him I was there. He said he always liked his lads to come and see him. I left and returned to the

1881.
Thomson
v.
Torrance
et al.

house a little after ten. I went in with the others to hear the will read; think he was lying on his back. The will was read over clause by clause. Mr. *Torrance* asked if it was right, and he said yes. He objected to the \$500. He said it was too much. Dr. *Barrie* took the pen and made the cross himself. Dr. *Barrie* said I know what I am doing. When I came in that night, the first I heard was about leaving the property to *Nancy Strachan*. They asked Dr. *Barrie* if he would not like to leave some money to some girls in New York. He said they were able to work for their living. I had not any particular difficulty in understanding what he meant. It was about an hour after I went in that the will was finished. Mr. *Torrance* read it aloud; not very fast, clause by clause. At the end of each clause, Dr. *Barrie* showed his satisfaction by speaking, I think.

Judgment.

Elsie Davidson.—I knew Dr. *Barrie* since 1862, intimately. I remember the evening the will was made. I went in just as they were speaking about the legacy to his cousin in Scotland. He was to leave her \$500; then after that, the cousins in New York; and he said, they were young, and could work for themselves. I had no difficulty in understanding him. The hospital was mentioned, and he said he would not leave anything to that. I was there when the change was made from \$500 to \$200. I think he said, "I am a poor man. You must think I am a rich man." He objected to give anything to the Bible Society. I never thought anything else but that he understood the will when it was being read over. My impression is, that he could have signed the will if he tried. He seemed easier and in less pain on Saturday. I spoke to him. He held out both his hands, and said, Oh, lassie, is this you? and he held my hand between both his hands. He was in the habit of speaking to me in that way. The Rev. Mr. *Howie* came in and he knew him. He prayed with him. Dr. *Barrie* repeated a

passage from a Psalm. Dr. *Barrie* said, amen, quite loud. When Mr. *Torrance* asked him if he meant to leave anything to the church, Dr. *Barrie* said, of course, he meant to leave it. He said it would be equally divided between the schemes of the church. Mr. *Torrance* mentioned the Home and Foreign Missions and Knox College. I remember well those three.

Elizabeth Armstrong.—I saw Dr. *Barrie* the afternoon of the Friday on which the will was made; it was about three. He said he was badly pained. I had no trouble in understanding him. He asked me for a drink; he chose milk, which I gave him. I heard Dr. *Herod* asking Dr. *Barrie* if he would like his affairs settled, and he said yes. He said so in a loud voice. The doctor understood perfectly what he was doing when the will was being drawn. He was asked to whom he would leave the house and lot, and he said to Miss *Argo* if she staid with him until he died. I heard the doctor asked about his cousin in the old country, and his friends in New York; and he said they have got their health and can work. Mrs. *Mitchell* and Mrs. *Thomson*, also, and he said they have gotten plenty. Something was said about the hospital. He was asked about the Home and Foreign Missions. I always knew he had a great love for these. I have heard him say that any of his friends would never get any of his money. He never wished to have anything from them, and he never would leave them anything. He said it at different times at Eramosa. I had no doubt he understood what he was doing. He said he was going to sign the will, and Mr. *Torrance* took his hand. I think I heard him say twice to Miss *Argo*, you have done all you could for me lassie. I remember on Saturday the shirt being put on wrong, and he insisted on its being taken off and put on right. It was Miss *Argo* that mentioned the names of Mrs. *Thomson* and Mrs. *Mitchell* to the doctor.

1881.

Thomson
v.
Torrance
et al.

Judgment.

1881. *Alexander Gow*.—I knew Dr. *Barrie* thirty years.

Thomson
v.
Torrance
et al.

I went with him when he was buying his house in Guelph. He said they would have to suit the girl and she went and saw it. I was with him the Wednesday before he died. He was going about then. He was very bad on Thursday. I talked with him about many things. He said he and me had many a smoke together. He was getting in and out of bed every five minutes until three o'clock, when he was just completely worried out. I told him I would lift him out of bed as easy as I would a young girl. Well, says he Sandy you would kiss her. He was not out of his mind then. He was crying out with pain; when I told him not to hollow out; he said it was good for lock-jaw. I left him at six o'clock on Friday morning. I went for Dr. *Herod* to relieve him as he was being again troubled. He came Friday night and relieved him. He was then very bad; after that he became quiet. Dr. *Herod* asked him if he had settled his affairs, and he said no; there was some talk about getting Mr. *Torrance*, and I went for him. Dr. *Barrie* said Miss *Argo* was to get the house if she stopped with him to the end of the chapter. He also said *Esther* was to have his books and household stuff. The hospital; Miss *Strachan*; the church schemes; the sister; sister's family; his folks in New York were all mentioned, and dealt with by the doctor. The will was read aloud. I saw Mrs. *Mitchell* there on Sunday, who said that Dr. *Barrie* was sensible. I understood it was suggested that Mr. *Torrance* should draw the will, as he knew more than anybody else about Dr. *Barrie's* business. I would have liked to see the money go to the hospital or something else beside the church schemes. Dr. *Barrie* was not fit to make a will on Thursday night. He was very bad up to three o'clock in the morning. He was sensible on Friday night, and remained so until Monday. I will not say that at eight o'clock on Monday

Judgment.

morning he was fit to make a will. He was sensible I believe. 1881.

John A. Armstrong.—I knew Dr. *Barrie* since 1843. I had at different times conversations with him about his property, the last in July or August, 1877, the year he gave up preaching. He said he had never done much for the church in his lifetime; but what he had made he would leave to it. He said he would not leave anything to his friends as they did not need it. He told me he would not have bought the house but he wanted to leave it to the housekeeper, *Esther*; he thought it would be better than money. I saw him on both the Thursday and Friday before he died. I asked him how he was on Friday afternoon, and he said poorly. His mind did not seem to be at all wandering. I saw him again on the Sabbath, and asked him how he was. He seemed a little livelier; after, when I was fixing him, he put out his hands and caught one of mine and pulled me down, and said farewell, farewell. I heard Mrs. *Thomson* and Mrs. *Mitchell* talking, and Mrs. *Mitchell* said they were so glad he had his senses. I told Mr. *Torrance* what Dr. *Barrie* had said about the schemes of the church. Judgment.

Grace Mitchell.—I am a niece of Dr. *Barrie* and when he was a minister at Eramosa I resided about seven miles from him, and always was on good terms with him. I have ten children, two boys and eight girls. I was at his house on Saturday the 19th of July. I arranged that *Esther Argo* was to write if he got worse. His memory had failed a good deal. I got the first letter on Monday night or Tuesday morning; the next letter on Saturday, we might have had it sooner. I arrived there on Sunday morning and remained until after the funeral. Mrs. *Thomson* got there about twelve o'clock on Sunday night. I never heard of the will until after his death. His memory had been failing. He did not remember things. He

Thomson
v.
Torrance
et al.

1881.
Thomson
v.
Torrance
et al.

would act as if he were cutting his tobacco or driving horses. He said he was driving Fan. I visited him once or twice a year, and if any of us were sick he came to see us. I heard from my daughter he was ill, and therefore it was I came in on the Saturday. He then said he was able to help himself. When the pain was gone he was quite rational and able to talk with me. When I went in on the Sunday I spoke to him, but could not make out what he said. I said one time to please my mother, that my uncle recognized her, but he did not.

Ellen Burr says—I should call Dr. *Barrie* sensible when I saw him on Friday before his death. I told my father on the Saturday following that a will had been made.

George Thomson, son of the plaintiff, works on the railway at one dollar a day, and evidently thinks strongly he should have been considered in his uncle's will.

Judgment.

Walter Thomson, another son, of the same mind. He visited Dr. *Barrie* at nine o'clock, a. m., on Monday morning and found him pretty near his last. He refers to some statements alleged to have been made by Dr. *Herod*, on which he says he chiefly caused proceedings to be taken against the will. I was much disappointed at the will I supposed it was a fraud or conspiracy—they made the will; Miss *Argo* and Mr. *Torrance*. If the will had been made sooner I should say it was proper. I have taken the management of the suit.

Annie Chambers, a daughter of *George Mitchell*, says she saw her uncle on Saturday, the 19th. Miss *Argo* then gave me some instances of his great forgetfulness. *David Roe*, Dr. *Barrie* and the plaintiff seemed to be on friendly terms. He was formerly a man of vigorous mind and memory.

Helen Mitchell.—I am a daughter of *George Mitchell*, and live about nine miles from Guelph. I saw him [Dr. *Barrie*] on the 14th July. At times he was queer,

at other times quite wrong. He said his memory was completely gone. 1881.

Alexander Dickson.—I was an elder in Dr. *Barrie's* Church, and remember he gave up his charge because of failing health. His memory failed too. I was in Guelph the Sabbath before his death. He was very low and did not recognise me.

Thomson
v.
Torrance
et al.

Andrew Findlay.—The doctor's memory was bad. I saw him the Thursday before he died. He was lying on his side and seemed unconscious. I did not try to arouse him. He seemed to be suffering pain.

The Rev. *Wm. Reid* explained the schemes of the Presbyterian Church.

The plaintiff says Dr. *Barrie* was fully 85 when he died. I was always on good terms with him. I first heard of his being ill at five on Sunday afternoon, and I arrived in Guelph at twenty minutes before twelve that night. He did not recognize me. I remained there until after the funeral. Those of my family that are living are doing well, my husband left three hundred acres of land from which I am entitled to my living. Judgment.

George Mitchell says, he and his family were on the very best of terms with Dr. *Barrie*. One of my daughters was in being examined for a teacher while he was ill, and she remained with him then. She sent out word he was ill and we went in on the Saturday week preceding his death. When first I saw him he was very bad; in the evening he was a good deal better. We received a letter saying how he was on the Tuesday, and another on the Saturday night. I found him lying senseless the Sabbath before his death. I remained until the Monday morning. On the Sunday Dr. *Herod* said he did not think Dr. *Barrie* would last the day, and so I sent out for Mrs. *Thomson*. I first heard of the will the night before the funeral.

Ann Auld says, she saw Dr. *Barrie* about twelve at noon the Friday before he died. He was then quite

1881. unconscious. Visitors came in and looked at him as if he were dead. Miss *Argo* spoke to him but he did not answer—he was beyond speaking. There was no Dr. *Barrie* there at all. There was no change in his state. There were regrets expressed that he had not made a will. He was better on the following day. He made an effort to speak. I am sure no prayer was offered up while I was there that day. I have left Mr. *Torrance's* church—there was a little feeling. I blamed Mr. *Torrance* for making this will. Miss *Argo* served Dr. *Barrie* faithfully. I thought he was intending to buy this house for *Esther*. I never was there just after the doctor relieved Dr. *Barrie*.

William Mitchell.—For some time before his death Dr. *Barrie's* memory was very weak. My daughter, Mrs. *Burr*, had been to see Dr. *Barrie*, and she told me he was ill. I saw him the Friday before his death and stopped until half past seven that night. I spoke to him—he did not seem to recognize me. Miss *Argo* came out to where I was sitting, and said to Mr. *Armstrong*, he is moving, we had better have it done now. I said to *Armstrong*, is it possible you are going to try to get that man to make a will, and he looked at me and said, yes, it will be all right if you can get him to say yes. There was a great difference between the articulation with the teeth and without them. He was very deaf. He was on good enough terms with his sister. He and I had arranged to go up and see her the week he took sick. I never heard of a coolness between them. I thought I was not wanted there longer that night, and so I went away. I knew they were going to make a will. Dr. *Herod* had been sent for. I do not think it was possible for him to have consciously made a will. I think he was racked with pain. I understood the doctor was coming, and that Mr. *Torrance* and Mr. *Armstrong*, all old friends of his, were going to make a will. I found out from my daughter on Saturday morning that the will had

Thomson
v.
Torrance
et al.

Judgment.

been made. I have taken an active interest in this suit. I expected some books from Dr. *Barrie*. I did not tell my brother about the will when I saw him on Sunday morning. I had heard that the house and lot had been given to Miss *Argo*.

Charles Auld.—I have known Dr. *Barrie* for twenty four years. Prior to his last illness his mind was not so bright. He was bad about a fortnight before his death. He was very bad the Wednesday before his death. He was very restless on Thursday. He had a paroxysm and then got into a stupor which never left him. He was confirmed in that stupor on the Friday. I made no attempt to speak with him. I was there on the Friday when Dr. *Herod* said, had you not better make a will. Dr. *Herod* said he would send for Mr. *Torrance*. Then the operation was performed and Dr. *Herod* left, and I was left alone in the room with Dr. *Barrie*, and he fell into the same stupor again, and remained in it until I left. I did not try to speak to him. I left between eight and nine. Mrs. *Auld* left before me. I left Mr. *Torrance's* congregation some weeks before Dr. *Barrie* died.

William Rowe Thomson.—Repeats some statements alleged to have been made by Dr. *Herod* at the time the will was opened. I made up my mind the will was a conspiracy to cut us all out. Mr. *Torrance*, Mr. *Gow*, Miss *Argo*, and Dr. *Herod* were the conspirators. At this meeting Dr. *Herod* took the responsibility and said he had advised Dr. *Barrie* to make the will. Nothing would make me believe this was his will, or change my mind upon the matter.

Joseph Wood.—I saw Dr. *Barrie* on Saturday. He was then dead to the world. I was there a couple of hours.

Jane Hicks.—Miss *Argo* came to me one evening to see whether Mr. *Hicks* or Dr. *Barrie* had the deed of the house. They were not expecting Dr. *Barrie* to live at this time.

1881.

Thomson
v.
Torrance
et al.

Judgment.

1881.

Thomson
v.
Torrance
et al.

The Rev. *James Duff*.—I knew Dr. *Barrie* since the year 1849. His idea was that he had made his money and that he was not indebted to his friends, and that the church would get it after he had done with it. He said this several times and repeated it to me since he came to the house in which he died. I came down the Thursday before he died, and remained until four or five on Friday afternoon, when I was obliged to return home. He seemed to be labouring under the influence of medicine on the Thursday. I remained up with him that night along with Mr. *Gow*; about twelve midnight he was as clear in his mind as ever. He wanted to get up himself that night, and I took his legs and he said, Duff take care of my legs, and *Gow* said I am sure I am lifting you as gently as a young lassie; and he said, yes, if I had been a young lassie you would have kissed me. He spoke naturally in his joking way. He was a man of strong intellect and an indomitable will. You could not thwart him; if he wanted to take a certain course you could not take him off it. I recollect the Rev. Mr. *Smith* being at Dr. *Barrie's* on the Friday. He was then very weak and wanted quiet.

Judgment.

George Barron.—Dr. *Barrie* said he had never been beholden to any of his friends; that if he had anything when he died, God had enabled him to earn it, and it should be given to God. He meant by that the schemes of the church. He spoke to me and was very much interested in education. Knox College and the Home and Foreign Missions of the Presbyterian Church. He said his housekeeper was a jewel of a creature. It is over twenty years since he talked to me about the schemes of the church.

Mrs. *Agnes Scott Elliott*.—I saw Dr. *Barrie* on the Thursday before he died twice. The first time at half-past one. He was then sick. The next time at four. He was then better and quieter. I saw him also on Friday. I saw him on the Sunday, and Mrs. *Mitchell* said he was very weak, very weak, but

sensible, quite sensible. Mrs. Thomson said he was sensible to the last. I thought him sensible on Friday and also on Monday morning.

1881.
Thomson
v.
Torrance
et al.

Jane Dryden.—I had a conversation with Dr. Barrie, when he said he wanted to get a house for his housekeeper. This was two or three weeks before he got the house. I saw Dr. Barrie the Saturday before he died, and he was then quite sensible. He said he was very weak and asked me if I had brought my daughter with me.

Rev. James Howie.—I saw Dr. Barrie on the Saturday morning before his death, about ten in the morning. I asked him if he were resting on Christ for salvation, and he replied he was, and he quoted the Scripture passage, "There is no other name given under heaven or among men whereby we may be saved." I understood him distinctly. I prayed with him. He said he heard every word.

Thomas Scott Elliott.—I saw Dr. Barrie on the Thursday and Friday before he died, between eight and nine in the morning of the latter day, and about seven in the evening of the same day. I lifted him up on the Saturday following, and he said, to be very careful, that he was easily hurt. He wanted me to change his shirt, which was put on wrong side foremost. He understood then perfectly what he was saying and doing. I was there on the Sunday when Mrs. Mitchell, in answer to an inquiry from my wife, said he was very weak but perfectly sensible.

Judgment.

James Hicks.—Dr. Barrie bought the house from me, and he said it would not be very long that he would be needing the house; and after his death he intended to leave it to his housekeeper. Somebody came in the evening a few days before Dr. Barrie's death, to see me about the deed of the property.

William Weir.—I knew Dr. Barrie for nearly twenty years, and was a member of his church. He took me to see the house he bought in Guelph. He

1881.

Thomson
v.
Torrance
et al.

told me it was his intention to leave it to *Esther*. He often mentioned her and talked of her services. He told me not to say anything to any person about it.

William Mitchell.—Dr. *Barrie* spoke to me about going home to the old country and spending his last days there; that he had enough to keep him. He never said he was going to leave anything to the church.

James Loghrin.—Dr. *Barrie* never told me how he was going to leave his property. He urged me to leave my property in a particular way. He wished me to leave a part of it to the church, and I understood from that he intended leaving his own that way. He wanted me to endow a scholarship in Knox College. I have always heard him say that he paddled his own canoe from his youth up, and that he was not indebted to his friends.

Judgment. Dr. *Herod* says: I have been practising since 1854 in Guelph, and have been from that date until his death the medical attendant of Dr. *Barrie*. He was troubled with an enlargement of the prostate gland, accompanied with a difficulty in making water. This had no effect on his mind, memory, or recollection. I remember the day the will was made. It was on Friday, the 25th July. The thought of the will originated with me. It is a custom I have in all cases, since ever I have been in practice for thirty-three years, when I see that there is danger of a man dying I always inquire whether his affairs are settled. I think when I made my early call on Friday, I spoke to Mr. *Torrance* and asked him if he thought Dr. *Barrie* had made his will, and he and his housekeeper said they did not know anything about it. I left the house telling Mr. *Torrance* the importance of making the will. Mr. *Torrance* said there was an examination at the Public Schools, and he would be very busy that day. I went back to the house between ten and eleven to speak expressly about the will. I went into

Dr. *Barrie's* room and asked him if he had made a will, and he said, no; and I then reminded him of a conversation that took place between us when Mr. *Sandilands* was upon his death-bed; and after I mentioned it, he said he remembered it perfectly well. I said, I am astonished you have not made yours; and he said well, it ought to have been done, I want it done. I remember how comfortable Mr. *Sandilands* was after he had made his will. I had no difficulty in understanding him, although I can understand how people that were not acquainted with him had. I had ordered him some days before to take his false teeth out as they were troubling him. He said something to me about Mr. *Torrance*, and I said I would be up with him about five o'clock in the afternoon. I did not return from the country until late. I had not dinner until six, and about seven I started driving for Dr. *Barrie's*. I met Mr. *Torrance* on the road and told him of my promise to Dr. *Barrie*. Mr. *Torrance* said he was going to get something to eat, and he went into my house for that purpose; and I went up to Dr. *Barrie's*, promising to return for Mr. *Torrance*. I then passed through the crowd of people in the dining room and went into the bedroom and shut the door of that room; and I put my face down as I usually did to his ear, and said, well, Mr. *Barrie*, you know the conversation I had with you this morning about the will. Are you willing to have your will made? And he said by all means. He said I want my will made, and it should have been made before. I want to take and make arrangements as regards my lassie. I suppose he had reference to his housekeeper. I asked him, who are you going to have to draw your will, Mr. *McLean*, the lawyer. They told me he had been doing his business. I always considered a will should be made by a lawyer. He said, no, as loud as possible. I said, who do you want, and he said, *Torrance*. He knows my affairs better

1881.
Thomson
v.
Torrance
et al.

Judgment.

1881. than any other man. I used the catheter on that occasion.

Thomson
v.
Torrance
et al.

Judgment.

He had then perfect capacity for making a will; as sane as you or I. Mr. *Barrie* was an eccentric man, but he never lost his senses; he recognised me up till Monday morning. When I returned home I thought I could be of no use. As I was very tired I went to bed, and when Mr. *Davidson* came for me I said they had plenty of people there, and I knew nothing about his affairs and they could make his will for him. I went up a little after 8 the next morning and relieved him. When I went into the room I said, well Mr *Barrie* how do you feel this morning? and he said, well I feel pretty comfortable, and I said what sort of night have you had? and he said, well I have passed a better night, and I then said to him, did you make your will and settle up your affairs? and he said yes; Mr. *Torrance* was here and drew my will, and I feel more comfortable since it is done; there is a great weight off my mind. He said *Torrance* drew the will and made everything right. He understood what he was saying just the same as he did 25 years ago; his mind was as clear as a bell if you only approached him right. I saw him three times that day; in the morning; in the middle of the day, and at night. I spoke to him each time. The first time he did not recognize me was on Monday. He was in pain on Thursday. I put a little Morphine into the Bromide of Pottassium which I was giving him to induce sleep. I thought sleep would be everything to him. There was a little delirium about mid-day on Thursday, owing to the Morphine. In the evening of that day he was perfectly rational; he had slept a few hours and it had a wonderful effect on him; and he was perfectly rational. He was very sensitive to pain, and used to writhe as I introduced the Catheter. I had to use a peculiar Catheter purposely made. I saw on Wednesday that he could not recover, as the kidneys were not secreting the water, it would

affect the brain; this took place on Monday. After I relieved him of the water by the use of the Catheter he would lie down in bed and be as comfortable as possible.

1881.
Thomson
v.
Torrance
et al.

I was present when the will was read. I heard them talking about the will and saying it was all perfect nonsense, and the man was not in his senses, and that undue influence was used, and threw slurs at the executors, and, as I understood, more particularly Mr. *Torrance*; and I then told them plainly the story of the whole matter and how the will came to be made. I said if Mr. *Barrie* had not sense enough to make that will on Friday night he had not had capacity to do so for 10 years before. He was a man who formed his own notions for himself, and was able to express them. I have no doubt at times he suffered excruciating pain: after the catheter was used there would be pain for a short time, and then relief, and then the desire to make water would afterwards return which is painful. I swear distinctly that until Monday morning he was quite competent to make a will. He would not have been competent to make his will while under the influence of the medicine I gave him, but on Thursday night he was perfectly competent, because then the effects of the medicine had gone off, and he had a sleep of several hours.

Judgment.

I collected some of the leading authorities on the question of testamentary capacity in the case of *Wilson v. Wilson*. (a) I have gone over these and some others, including the case of *De lafield v. Parish* (b), with its elaborate citation of decisions, and exhaustive discussion of the subject. I propose to consider a few more of these decisions and endeavour to ascertain from them some principles applicable to the case in hand. From them it appears that although the will be procured by interrogation and does not contain

(a) 22 Gr. 39.

(b) 25 N. Y. 9.

1881. the will of the testator as to the whole of his property, yet so far as it goes it is valid. In the case of *Billinghurst v. Vickers* (a), the Court pronounced against one portion of the will and in favour of the other, allowing probate of this latter part to issue.

Thomson
v.
Torrance
et al.

In *Green v. Skipworth* (b) the testamentary paper propounded, although very defective and peculiar in form, was admitted to probate. "A will made by interrogatories is valid, but undoubtedly whenever a will is so made, the court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case"—quoting *Swinburn*, p. 108. In the case of *Constable v. Tuffnell* (c) the whole contents of the will with all its suggestions were prepared first and submitted to the testator, who then assented to them and allowed them as the basis of his will. It did not originate with him. On this Sir *John Nicholl* says, p. 477; "It is no part of the testamentary law of this country, that the making of a will must originate with a testator, nor is it required that proof should be given of such a transaction, provided, I repeat, it be proved that the deceased completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition." And again, (p. 485) "Whether the will originated with the deceased, or was suggested to him, yet if he (possessed of testamentary capacity to understand and comprehend) adopted and approved of it, and was resolved and decided so to dispose of his property, the will must be pronounced for: for it is not necessary, as I have before observed, that the court should have before it the very origin of the whole transaction; nor that the will originated with the deceased himself; it may have been suggested by the persons around him; but if

Judgment.

(a) 1 Phill. 187, 199
(c) 4 Hagg 465.

(b) 1 Phill. 53.

1881.

Thomson
v.
Torrance
et al.

importunity is to vitiate the instrument, the importunity must be proved, and proved to be of such a nature and degree that the deceased was unable to resist it; that his free-will and free-agency were destroyed and that he acquiesced only for peace."

P. 486. "Where fraud, conspiracy, and perjury are imputed, the imputation must be supported by strong facts and clear evidence; it is not to be maintained upon slight variations between the witnesses as to times and dates, and trivial circumstances, nor upon conflicting opinions as to capacity. No case occurs in which such variations may not be picked out, and such differences of opinion extracted. It does not, therefore, seem a matter of duty cast upon the court to discuss minutely all the different parts of the evidence in this cause."

P. 503. "Suppose, then, that the instructions of the 8th of August did originate from the remonstrances of Mr. Bailey, in the way this witness has suggested, yet that would not of itself vitiate the testamentary act."

To this may be added the case of *Sugden v. Lord St. Leonards*, L. R. 1 Pro. & Div. 154, 213, 214, 230, 248, 249, where, although it was admitted that the whole of the will could not be reproduced by the witness, yet effect was given to the part she remembered.

In *Ross v. Chester* (a), a will executed when the testator was in *extremis*, the instructions for which had been conveyed through the person benefited by it, was sustained.

In *Deare v. Elwyn* (b), a case of great mental weakness, the will was sustained.

In *Marsh v. Tyrrell* (c), *Combe's* case and the other earlier cases, are referred to and approved at p. 122 of the judgment. In *Menzies v. White* (d), one of the witnesses, an executor of the will, stated in his evidence that he refused to have anything to do with the will,

(a) 1 Hagg. Ec. 229.

(c) 2 Hagg. 84.

(b) 1 Notes of Cases, Ec. & Mar. 342.

(d) 9 Gr. 574.

1881. and that he followed *White* into the room where the deceased lay, and heard him call him by name two or three times. "*White* said, have you made a will? *Lawson* did not answer. *White* asked me if I knew if testator had made a will; I said I thought not. *White* then turned to testator and spoke loudly in his ear trying to arouse him, and asked him if he had made a will. *Lawson* opened his eyes, and in a low voice said: 'No.' *White* then asked him how he would like to have his property left; he made no answer. *White* repeated the question once or twice more. *White* asked him if he wished his honest debts paid. I understood him to say 'yes,' in a low voice. *White* pointed to his wife and said, I want you to make provision for that old woman; you know *Lawson* one-third of this place won't support her. *Lawson* made no reply. *White* then said, do you think £50 a year will support her; *Lawson* said nothing. *White* then said will £75 be enough? *Lawson* then said, yes.

Judgment. *White* asked him what was to be done with the rest of the property. *Lawson* gave no answer. *White* asked him again but there was no answer. *White* then said, well I suppose we had better leave it go as the law directs. I heard no answer, but I think the testator by his look assented. I cannot say he answered one word. *White* asked him whom he would have for executors, he said nothing. *White* said, will you have *Archibald McNab* (meaning me,) and *William Lyon*, your old neighbours. During all this time *Lawson* said nothing but yes or no. He made no remark of his own accord; suggested nothing; he appeared to be, as I considered, in a deep sleep or sort of stupor."

White read the will in portions, asking him at the end of each portion if he understood it; testator said yes. The two daughters of this witness confirmed his statements. *Robert Muir*, the other witness present, says: "Mr. *White* then asked him how he would like

his property to be left. *Lawson* did not say; he answered merely as *White* asked the questions about the provision for his wife. *Robert Lyon* states, that except that *Lawson* said, "I know I am leaving all my property to my old woman, he said nothing else but 'yes.'" The two doctors stated that the deceased was sensible whenever they spoke to him up to the last. The wife was not told of the making of the will, nor did she know of it at the time. There the testator had made a previous will, but in answer to the question whether he had done so or not he answered, no. The learned Chancellor then states, the material question is, did the testator, on this will being read over to him understand its purport, and freely and deliberately assent to it?

1881.

Thomson
v.
Torrance
et al.

In that case the will was upheld. There are some observations in the case of *Martin v. Martin* (a), which are worthy of note. In that case Dr. *Thornton*, who had prepared the will, said, "On the Saturday he was not always able to complete a sentence, and I had great difficulty in understanding him. They (Mrs. *Martin* and Mr. *Starr*) had frequently to help me to the understanding of his meaning. Without their help I could not, in many instances, have made out his meaning, he spoke so indistinctly, and was so weak. There were frequently sentences we could not fully understand. There were some points we did not put down at all because we could not make them out; that not being able to understand his meaning sometimes, he does not think that the will, as drawn, contains all that was in the testator's mind, though he thinks that it does so to a considerable extent, and he did the best he could to ascertain and express the testator's intention."

Judgment.

Dr. *Thornton* expresses an opinion also, that the deceased was not capable of grasping the will as a

(a) 12 Gr. 500, and 18 Gr. 586, in App.

1881.

Thomson
v.
Torrance
et al.

whole, though he did not at the time, and does not now, draw from the suspected inability an inference that the deceased wanted testamentary capacity. Upon this state of facts the Vice-Chancellor says, "*Mitchell v. Gard* (a) is an express authority that an omission from a will of something which the testator wished and intended it should contain does not affect the validity of the will in other respects; and I am clear a will cannot be invalidated by the doubt of the attorney or other person who drew it, as to whether it is entirely in accordance with the testator's wishes, he having done his best to ascertain and express such wishes, and not doubting in the main that he had succeeded." Again the Vice-Chancellor, dealing with the other branch of the case, says: "There are observations by the Court in *Bird v. Bird*, where the will was upheld, which apply to this part of the case. It is said that it is a will by interrogation, but it is not what is generally understood by the expression; it was not will you give such a person such a sum, and then a mere affirmative acquiescence; but in this case some of the persons were named, and the deceased freely and voluntarily declared what he would give."

Judgment.

This case was considered in the Court of Appeal, and the finding in the Court below upheld. The late Chief Justice *Draper*, in adopting the conclusion of the Vice-Chancellor, says: "The evidence very clearly shews that the matters contained in the will were written by Mr. *Thornton* as being the expression of the wishes and intentions of the testator for the disposition of his property; not *all* that Mr. *Thornton* believed was in the mind of the testator, but to a considerable extent what was so. * * The expression was far from continuous, not one act the result of unbroken continuity and concentration of thought (as the medical attendant expressed it) first deliberately conceived, and then deliberately dictated; but uttered at intervals when

(a) 32 L. J. Pro. 129.

the mind (which wearied and exhausted by the previous effort,) had been recalled to the point at which he had broken off, and thus by slow degrees the writer was enabled to gather and put into writing the disposition of his property by the dying man. The second witness establishes first what the other evidence confirms, a failing mind in the dying man; an incapacity to fix his attention except at intervals—a difficulty of communicating his wishes.” * * He sometimes was in doubt what to say, and did not define it. * * It was painful for me to draw the will because of my doubts of his meaning. I am not satisfied that I gathered his meaning on all the points of the will.” See also *Hegarty v. King* (a).

I presume there can be no doubt where, as a general rule, the *onus probandi* is in these cases. I take it that in a contentious case the burden of proof lies upon the person propounding the paper to satisfy the court that it represents the will of the testator,—that it is the last will and testament of a free and capable testator. The law fixes the descent of property on death, but, under certain conditions, it gives the power to vary this devolution. To effect this certain capacity and certain formalities as to execution are requisite. See *Delafield v. Parish* and *Barry v. Butlin* (b), where Baron Parke delivering the opinion of the Privy Council, says: “The rules of law according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the present appeal, and they have been acquiesced in on both sides. These rules are two: the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will and testament of a free and capable testator. * * The strict meaning of the

1881.

Thomson
v.
Torrance
et al.

Judgment.

(a) L. R. Ir. 5 Ch. Div. 249, Wm's on Exrs. pp. 41 and 42.
(b) 2 Moo. Pri. Co. 480.

1881. term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a will; it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed."

Thomson
v.
Torrance
et al.

In the present case, the matter under the terms of the order, is brought rather peculiarly before the Court, as after the transfer of the cause from the Surrogate Court to the Court of Chancery, it was ordered "that the said contestants be at liberty, within ten days from the date hereof, to file a bill in this Court attacking the validity of the said will," &c. The peculiar form of the order appears to have cast the onus of attacking the will at once on the plaintiff, although I do not know that this makes much difference as to the mode in which I am to approach or deal with the question of fact. It in reality comes back to the proposition as put by Lord Brougham in *Panton v. Williams*(a): "The course of administration directed by the law is, to prevail against him who cannot satisfy the court that he has established a will. There is no duty cast upon the court to strain after probate. The burden of proof eminently lies upon him who sets up a will."

Judgment.

I shall first look at the oral testimony and try to ascertain therefrom the state of mind of the deceased, whether there was the intention to make a will, whether it was actually and intelligently signed, whether there was capacity to execute it, or recognition of the act; or, in other words, whether the deceased was competent to make a will, and whether it expresses his intention in the disposition of his property. Was there any delusion, or was there mere weakness or drowsiness? Is it that the mind was so enfeebled as that it could not grasp the object, or that

(a) 2 N. C. Supp. 21.

it could but grasp the one object, and it was so forced on the mind that other matters were thereby shut out? In the present we have, as is usual in most other cases, a wide divergence in the opinions of many of the witnesses. Some of these given honestly; others biased by desire to aid themselves or their friends, or by feelings of annoyance at the recipients of the deceased's bounty, or at those who were instrumental in procuring the will. These conclusions vary, from Mr. and Mrs. *Auld*, on the one hand, who say that from Thursday or Friday until his death there was no Dr. *Barrie* there at all, but only his body, to Dr. *Herod*, on the other hand, who states equally positively that up to the morning of the day of his death he was quite competent to make a will. In dealing with this branch of the case it is necessary to consider the different powers of the witnesses to form correct opinions on difficult questions of fact, the different opportunities they had of seeing the deceased, the probability of their being recognized or not in attempts made by them to arouse the deceased and to awaken his attention; his condition varying, as is so often the case, at different times as he was more or less affected by the trouble which caused ultimately his death. The following facts are proved beyond dispute: The deceased was in his eighty-fifth year when he died. He had been a man of strong mental power and determination, capable and self-willed, but these powers and his memory had been weakened and impaired by bodily infirmity. He had been more or less troubled with illness for the seven weeks that preceded his death. He was ill on Saturday the 19th of July, when he was visited by some of his relatives. He was better on Monday the 21st, when Miss *Argo* wrote the letter to Mrs. *Mitchell* informing her of his improvement; he having been able on that day to be out in the garden. The aperient medicine affected him injuriously on the Wednesday, when the doctor gave him a draught in which

1881.

Thomson
v.
Torrance
et al.

Judgment.

1881.
Thomson
v.
Torrance
et al.

there was morphine, which distressed in place of soothing him, and he became very ill on Thursday. The second letter was written to Mrs. *Mitchell* on the morning of Friday, on the enve'ope of which were the words, "please deliver immediately." And on the night of the same day, between nine and eleven, the will was made and signed by the deceased as a marksman. It took from one and a half to two hours in its preparation. On the evening of Saturday the *Mitchells*, not having sent earlier to the post, received the second letter and came into Guelph early on Sunday morning. The deceased died at 4 p.m. on Monday, the 28th, and on Wednesday the 30th the funeral took place and the will was read. The deceased had a complete set of false teeth, which he took out some days before making the will under orders from the doctor, and the want of which interfered somewhat with the distinctness of his speech. There is no doubt it was Dr. *Herod* who suggested the making of the will, and that Mr. *Torrance* was either suggested by Dr. *Barrie* or Dr. *Herod* for the purpose of its preparation. The will was not instigated or prepared by those who received any benefit under it; nor by a person likely to influence dishonestly or unduly the mind of the deceased. The relatives now objecting were mentioned to the deceased, and, for a cause assigned, were rejected and passed over. Mr. *Torrance* takes nothing under the will. His evidence in his earlier examination differs somewhat from that given when examined before me, and there are variations between his testimony and that of the other witnesses present there during the whole or most of the time that the will was being prepared and signed. When these six witnesses were examined before me, I could not conclude but that they were honestly, according to the degree of attention paid and their best recollection, relating what actually took place. The case of the plaintiff is expressed in the evidence of some of her witnesses as one of

Judgment.

virtual forgery on the part of these persons, and then an attempt to sustain the act by perjury. Those who must have aided Mr. *Torrance* in the conspiracy are *John* and *Elsie Davidson*, *Alexander Gow*, *Walter Scott*, *Elizabeth Armstrong*, and *Miss Argo*, not one of whom except the last named took anything under the will; nor was any one of them, with the same exception, interested in any way other than in the endeavour to ascertain the wish of Dr. *Barrie* in the various matters of his will, and truly to express it. Mr. *Torrance*, while stating he thought Dr. *Barrie* competent to make the will on Friday, candidly admits he was not positive of his state after Saturday.

He also says that he did not know about his relatives, nor that he owned so much property as it turns out he possessed; and that if he had known these facts he should have pressed upon him more the case of his relations. *Miss Argo* states he was able to make a will, and understood perfectly what he was doing. *Elsie Davidson* says: She never thought but that he understood the will. *John A. Davidson* says: I have no doubt Dr. *Barrie* understood what he was doing and assented to it intelligently. *Walter Scott* says: Dr. *Barrie* shewed his satisfaction with the will. He said he knew what he was doing. *Elizabeth Armstrong* says: The doctor understood perfectly well what he was doing when the will was being drawn. *Alexander Gow* thought him quite sensible on Friday when the will was being made, although he candidly admits he was not so on the preceding Thursday. The medical attendant states that he was as capable then as he had been for ten years previous to the making of this will.

The case in judgment is peculiar in this, that while it cannot be seriously argued that there was a conspiracy on the part of these persons to make or sustain this will, it is one of the few cases in which all the witnesses and the medical attendant concur in the capacity

1881.

Thomson
v.
Torrance
et al.

Judgment.

1881.
 Thomson
 v.
 Torrance
 et al.

Judgment.

of the deceased at the time the will was made. But it was very forcibly argued that, notwithstanding these statements, the mode of procuring this will, as detailed by these witnesses, must convince the Court that it cannot stand; that it is a will by interrogatory, and in its worst form—suggestive interrogation. There is no doubt that the will was obtained by interrogation, and that these interrogations were accompanied by suggestions, and that this mode of obtaining the will, shews the extreme weakness and lack of mental power of the deceased—differing no doubt much from the Dr. *Barrie* of earlier years. When the house was first mentioned, there was not then any direct answer made as to what the deceased desired to have done with it; but Dr. *Barrie* said, that is the drawback. This was followed by the suggestion whether he would leave it to *Esther Argo*, to which he assented in the qualified form, which is found in the will, if she bide with me to the end of the chapter, which was a favourite expression of the doctor's. This answer is important as shewing that he grasped the question—knew with what he was dealing and remembered the condition on which he had evidently desired from the first that this property should be acquired by his housekeeper. When his sister in *Garafraxa* was suggested, he answered very positively, no; or, as another witness says, she had enough. When the *Mitchells* were mentioned, the answer was, they have no need of it. When their claim was further urged on the ground that there was a large family, and that one was named after him, the answer still was, they have gotten plenty. When his nieces in New York were spoken of, the reply was, they can work for themselves, or, they are young and can work for themselves. When his relative in Scotland was referred to, he expressed a desire to aid her, saying, poor creature, she is in poor circumstances, I must leave her something; and after some question he assented to £100 or \$500. When the Bible Society

1881.

Thomson
v.
Torrance
et al.

was mentioned, the answer was, it is prospering. When the General Hospital was spoken of, and Mr. Gow, who was interested in that institution, and states he would have preferred it in place of the schemes of the church, he first assented, but would not after allow even \$100 to go to that charity. When the will was being read over he objected to the \$500 for Miss Strachan, and on his saying, I am a poor man, it was reduced to \$200. These witnesses all assert that in their opinion he assented to the will as read; and that, although in the opinion of some of them he could have signed it on the suggestion of Mr. Torrance he knowingly put his mark to it. This was not to be wondered at, as from the tremulousness of his hand, Miss Argo had for years done his writing. When it was finished, he took Miss Argo by the hand and thanked her, saying, "You have done all you could for me, lassie."

We have here not only the deliberate opinion of those present at the drawing and signing of the will, but also their testimony as to what then took place, as a means of further judging of the capacity of the deceased; and, unless there be some very conclusive evidence to negative this, there is abundant proof of the capacity of the deceased and the execution of the will. It is a case in which the deceased, from the nature of the disease from which he was suffering, would sometimes be better in mind and body than at others. He would be troubled until the catheter was used—then for a time irritated and craving rest; when refreshed the mental capacity again returning. It is also worthy of note that the voice and knowledge of the ways of the deceased would give to those well acquainted with him a readiness and power in attracting his attention and comprehending his meaning not possessed by others.

If we go beyond these witnesses and speak of the time that preceded and followed the procuring of this paper, we have Charles Auld, who says Dr. Barrie had a paroxysm on Thursday, from the

Judgment.

1881.
Thomson
v.
Torrance
et al.

effect of which he went into a stupor which never left him. Mrs. Auld says from the Friday, there was no Dr. Barrie there. Andrew Findlay says he was unconscious; and on this Friday, the Rev. Mr. Smith states that when he was there Mr. Torrance and Mr. Duff said Dr. Barrie could not engage profitably in prayer, and so he gave up the attempt to pray with him. He adds that, although at times suffering great pain, as soon as the water was removed he became a different man. In answer to these, we have the statement of the Rev. Mr. Duff corroborating that of Mr. Gow, that after the sleep on Thursday night he awakened out of his disordered and lethargic state, and refreshed by the sleep his intellect was quite clear. The evidence of Mr. and Mrs. Scott Elliott, and the Rev. Mr. Howie, whom on the Saturday Dr. Barrie followed in prayer, and repeated a verse in the Bible. He, on the same day, Saturday, addressed Mrs. Davidson with, "Lassie, is this you?" He said to Walter Scott he always liked his lads to come and see him, and spoke to Jane Dryden and asked her if she brought her daughter with her. These all found him quite sensible. Looking at this portion of the evidence and omitting the statements of those connected immediately with the preparation of the will, I would have to conclude that there were times when the deceased's intellect was reasonably clear between Thursday and Saturday. The evidence of those surrounding him, when the will was made, shew that it was at one of such periods that the will was drawn.

Judgment.

Then, perusing the will itself, is there anything in it that points to want of capacity? It is true that, with one exception, his relations are omitted; but what was the position he had for years taken as to those omitted, and to those he made the objects of his bounty? It is clear that for years he had considered more or less the question of the ultimate disposition of his property. We find, as to his relatives, the expressions that he never

wished to have anything from them, and he would never leave them anything; that he had paddled his own canoe, and would not be beholden to them. We find also very positively that he intended the house and lot for Miss *Argo*, and with less clearness that, as he had not done much in assisting in the way of money the schemes of the church in his life time, he was determined to make it to a certain extent on his death the object of his bounty. Still less evidence to shew he intended to give his books to Miss *Argo*, who it is abundantly proved, was a faithful housekeeper, and looked well after him.

1881.

Thomson
v.
Torrance
et al.

As a matter of fact the names of those now finding fault with the will were in good faith mentioned to Dr. *Barrie* when the will was being made, and in pursuance, I believe, of his prior determination, they were allowed to do for themselves, and the objects of his bounty already determined on were made the recipients of the benefits bestowed on them by the will. There is no evidence to shew that Dr. *Barrie* was not on good terms with his sister; but he was not on such terms as to lead to much surprise if she were not referred to in the will. During the thirteen years preceding his death Mrs. *Thomson* had visited her brother twice. He appeared also to be on friendly terms with the *Mitchells*. These people, without being rich, seem able to support themselves, and it may be the doctor thought it would not be for their benefit that they should cease to be dependent on their own honest labour for their daily bread, and for the reason assigned passed them over. Mrs. *Thomson* is entitled to her support out of the 300 acres in *Garafraxa* left by her husband, which land was devised to her two sons, who are living upon it. The third son, *John*, had left the country for some time, and his residence is unknown. The fourth brother, *George*, does not seem to have had much left to him by the father's will, and he is now in the employ of the Great Western Railway Co.

Judgment.

Thomson
v.
Torrance
et al.

1881. at one dollar a day. There was no secrecy about the making of the will; nor do I find that Miss *Argo* was to blame in the matter of informing the relatives as to the illness of Dr. *Barrie*. He never asked that Mrs. *Thomson* should be informed of it. *Grace Mitchell* and Mrs. *Mitchell* knew on Saturday the 19th of the illness, as they were then at his house and saw him; but they did not write to the plaintiff, nor did any of the *Mitchells* send for her until the Sunday morning preceding the death. I cannot blame Miss *Argo* for not writing or sending sooner for Mrs. *Thomson* when her relatives at the house continually, and knowing the illness of her brother, did not do so. There was no secrecy as to the making of the will. It was known by eight people, before it was finished, that they were going to have it prepared; and on the next day Mrs. *Burr* was told of it by Miss *Argo*, and she told her father, Mr. *Mitchell*, that the will was made, and that the house and lot had been left to Miss *Argo*. No objection was made to the will or to the state of mind of the deceased when it was made until after it was read, nor was there any complaint made that Miss *Argo* should have sooner sent for any relative of the deceased.

Judgment.

A good deal of comment was made on the letter of Friday. It must be remembered that it was written shortly after Miss *Argo* had received the news from Dr. *Herod* that Dr. *Barrie* would not live, and that a will should be prepared. If the evidence of the other witnesses as to what took place is to be believed, it merely shews that, as is often the case, the wish expressed in the letter was fulfilled, and the desired opportunity given. This letter is not as strong against the witness as those in *Swinfen v. Swinfen* (a), and it has to my mind received a more satisfactory explanation than they did. The *Thomsons* and *Mitchells* appear to have misapprehended very greatly what Dr. *Herod*

(a) 27 Beav. 148.

stated the day the will was read: on this they seem to have determined to take proceedings to set the will aside. 1881.

I think Miss *Argo* was a truthful and honest witness. I was impressed favourably with the testimony of all the witnesses present at the period of the making of the will, as a body of friends who would not for a moment think of seeking to do anything but try honestly to find out the doctor's desire as to his property, and to give expression to it. At the close of the examination of the witnesses, I felt very strongly that the case of the plaintiff had failed, and thought the present a very much stronger case for the will than several of those then in my mind, as *Swinfen v. Swinfen*, *Menzies v. White*, and *Martin v. Martin*.

Mr. *Robinson* addressed to me a very powerful argument against the will, which caused me to go over the evidence more than once, and to reperuse the authorities with care. I have not forgotten the stress laid on what he characterized as the rude and partizan manner in which Dr. *Herod* gave his testimony; and, assenting to the justice of these comments, I have not placed the same weight upon it as if the too evident bias exhibited had been wanting. Nor have I left unconsidered any of the long array of facts so well summed up to impeach this testamentary disposition. To those already referred to may be added the waiting the best part of the day to try and get the will signed; notwithstanding the notice given to Dr. *Barrie*, how little prepared to make the will when he came to the act; that there was no intention on his part to make a will; that he was a man, if in possession of his mental faculties, not likely to take suggestions from others; that not a single devise originated with the deceased; that the author of the will did not know what property the deceased had; that he admitted if he had had this knowledge, he would have spoken to him seriously on the subject of his relations; that the will is inofficious; that the testator was eighty-four; that it took two

Thomson
v.
Torrance
et al.

Judgment.

1881. hours to prepare the will, although it covered but one foolscap sheet ; that they sent out and got the number of the lot from *Hicks*, shewing they thought they could not obtain it from the deceased. I felt at the time much pressed with the force of the argument presented, but after the best consideration I can give to the case, I am unable to conclude that there was in the deceased the absence of testamentary capacity, and I find in favour of the will, and that the paper propounded is the last will and testament of the deceased.

Thomson
v.
Torranee
et al.

Judgment. The bequests of the mortgages are void. As all the others interested with the plaintiff virtually joined with her in this litigation, I presume the order that should be made, will be for the payment of the costs of all parties to the litigation out of the property which does not pass by the will. This will include the costs of the proceedings in the Surrogate Court and of the transferring of the cause into this Court.

GREENSHIELDS V. BRADFORD.

1881.

*Statute of Limitations—Care-taker—Pleading—Proof of title—
Purchase for value.*

B. entered into possession of a small portion of a lot of land which he had fenced and cultivated, the lot being in a state of nature, and upon the agent of the owner discovering *B.* to be so in possession suffered *B.* to remain there, he agreeing to look after the property in order to protect the timber; and *B.* subsequently assumed to sell the whole to one *J.*, his grandson. On a bill filed by the owner, the Court, [SPRAGGE, C.], held that under the circumstances the Statute of Limitations did not run in favour of *B.* so as to give him a title by possession, and that *J.* was not entitled to the benefit of the defence of "purchase for value without notice," he having omitted to allege that *B.* was seised; that *J.* believed he was seised; that *B.* was in possession, and that the consideration for the transfer by *B.* to himself had been paid. Subsequently, and in 1878, the plaintiff's agent again visited the property, and obtained *B.*'s signature to a memorandum agreeing to hold possession and look after the property for the plaintiff: Held, a sufficient recognition of the title of the plaintiff, and that the defendants could not put him to proof thereof.

Examination of witnesses and hearing at Guelph.

Mr. Gibbons, for the plaintiff.

Mr. Moss and Mr. M. McCarthy, for the defendants.

The facts are fully stated in the judgment.

SPRAGGE, C.—The material facts are shortly these: Feb. 15th.
The plaintiff as owner of lot No. 1, ninth concession of Amaranth, had one Robert Thompson to look after it as his agent from about 1863 to 1873. In or about 1865 the defendant Bradford went upon a corner of the lot (the south-east corner) without any authority (squatted upon it as he says), put up a small shanty and inclosed a small piece of ground, from a quarter to half an acre, which he cultivated as a garden. In 1872 Thompson found Bradford living in the shanty, who spoke apologetically as to his being there; said he was poor, that he had found three or four acres chopped down which he had cleared up and had built a shanty; that he thought he had done no harm, and would leave Judgment.

1881. in case the land were sold, when *Thompson* told him that if he would look after the place, and report any acts of trespass, he might remain. The next material fact is, that the plaintiff himself, or, as *Bradford* puts it in his evidence, a man calling himself *Greenshields* came upon the place and saw *Bradford*. *Bradford* places this first at four or five years ago, then at six or seven years after he had been upon the place, which would be in the year 1871 or 1872. He says this person told him that he and his wife might stay on the lot during his life; and that he remained on the lot under that agreement as he supposes. On the 16th of August, 1878, a Mr. *Charles Minto*, as agent for the plaintiff, accompanied by Mr. *Barker*, a solicitor, who had also been agent for the plaintiff in looking after the place, went to the place where they saw *Bradford* who told them that he had been on the place as agent for the plaintiff; that he had been put there by the plaintiff to look after the place and protect the timber; that he had met the plaintiff there about two years before; and that he, the plaintiff, had left him there still as his agent. Mr. *Barker* then drew up the following paper, which *Bradford* signed.

Judgment.

AMARANTH, 16th August, 1878.

Mr. D. J. GREENSHIELDS :

Sir,—Hearing that you [are] about to sell lot number one, in the ninth concession of Amaranth, part of which is occupied by me, I would beg to remind you, that you agreed to allow me to remain upon it during my life. I now write to you that I would like to be allowed to remain during my lifetime and during the lifetime of my wife. I will still act as your agent in taking care of the place and keeping off trespassers.

ROBERT EVERETT BRADFORD.

Bradford says, in his evidence, that he did not understand this paper. This I entirely discredit as I do the evidence of his wife, who denied at first that

he had signed any paper, adding after much pressing any paper that she saw. From the evidence of *Barker* and *Minto* I should say that *Bradford* fully understood the paper; and his own evidence confirmed me in that opinion. It will be observed that the paper contains the words, "I will *still* act as your agent in taking care of the place." 1881.

Greenshields
Bradford.

I have omitted one piece of evidence by *Barker*, who says he saw *Bradford* in 1876 or 1877, when he told him to the same effect as he told him and *Minto* in 1878.

From this evidence it appears, satisfactorily to my mind, that *Bradford* was on the place in 1878, and thenceforward as caretaker of the place for *Greenshields*; that relation, a fiduciary one, having been created through the agency of *Thompson* in 1872, if not before by the plaintiff himself. There is some doubt as to when the plaintiff himself made the same arrangement, *Bradford* placing the date at various times; to *Barker* that it was, some years before he saw him in 1876 or 1877, and to *Minto* and *Barker* at two years before they saw him in 1878. It may have been after the arrangement with *Thompson* in 1872; the date is uncertain, and is not very material. Judgment.

There is authority, as I thought at the hearing for the position, that the statute does not run in favour of a caretaker against the person to whom he stands in that relation.

In *Ellis v. Crawford* (a), in the Irish Exchequer of Pleas, the question was, whether the person in possession was in as tenant of, or caretaker for the owner. It was held that he was in as tenant; but it was not questioned that if he had been in as caretaker, the statute would not have applied.

In a case in our Court of Common Pleas, *Heyland v. Scott* (b), a party claiming title had or had not possession according to whether the possession of his

(a) 5 Irish L. R. 402.

(b) 19 C. P. 165.

1881. caretaker was his possession. The jury "were told that if a person claiming title to a lot, send a caretaker to live on it, and specially to protect the whole from trespassers; and that he does so accordingly such may be a good legal possession of all so held and protected." This was objected to among other points, but upon motion for new trial was sustained.

Greenahields
v.
Bradford.

It is true that in the case before me *Bradford* was not put into possession as caretaker by the plaintiff, or his agent; but being found in possession of a small parcel, he by agreement became caretaker of the whole lot. It was not a mere acknowledgment of title, (which under the statute must be in writing), but a change of the relative positions of the parties, by an agreement which it was perfectly competent for them to make. By that agreement *Bradford* became *quoad* that land the servant of the plaintiff; and his possession in that character, was the possession of the plaintiff, and this would be so whether he discharged the duties of caretaker or not; for he could not set up his own neglect of duty to vary the position which his relation to his employer imposed; and it would be immaterial where, in what locality, this agreement and the new relation of the parties was made.

Judgment

It appears, however, as a fact to have been made upon the land, and that upon each occasion. The agent *Thompson* upon one occasion and the plaintiff himself upon another, going actually upon the land, in the one case as owner, in the other as agent; and there, in the one case making in the other renewing the arrangement for the caretaking of the place. The well-known case of *Doe Groves v. Groves* (a) has some application to this case. The facts are thus summarized by Lord *St. Leonards* in his book on the Property Statutes, p. 26: "Although a man has been in possession twenty years as apparent owner, yet the rightful

(a) 10 Q. B. 486.

owner may shew that the possession was not such as the statute will give effect to. Thus, where a widow and her only son, an infant, resided together on the property which had descended from the husband to the infant, and she married again, and her second husband lived with her son until 1805, when the latter, who was about twenty-one, left the premises, and the second husband acted as owner of the property; but the son occasionally resided two or three weeks at a time in the house inhabited by the second husband and his wife, and so resided there at the death of his mother in 1841, and remained about three weeks after her death, and in 1842 the surviving husband procured the son, the heir-at-law, to execute a mortgage of the property, and the money was paid by the son to the husband, it was held in ejectment by the mortgagee against the husband that the former was entitled to recover, as the presumption was that the husband held as tenant at will to his son-in-law." Lord *St. Leonards* says: "The defendant said that he occupied as apparent owner for twenty years. To this the reply was that the real owner came now and then and lived with him. Mr. Justice *Patteson* observed, that he did not say that a party having a legal title to an estate conveys it away by mere equivocal acts, which may amount to admission of title in another. But here the defendant's title rested merely on the Statute of Limitations, and his acts might well amount to an admission that during the period in question he was in fact tenant to another."

1881.
Greenshields
v.
Bradford.

Judgment.

The case is material upon this point among others; that the statute had commenced to run in favour of the defendant (who upon his step-son leaving, acted as owner of the property), when the acts from which his tenancy was inferred occurred.

Randall v. Stevens (a), may also be referred to.

(a) 2 E. & B. 641.

1881. *Allen v. England* (a) resembles the case before me, in this aspect of it very much; differing however in this, which I think is not material, that the occupation in that case began by the permission of the owner of the land. The case is summarized by *Darby & Bosanquet*, at page 265, thus: "In *Allen v. England*, which was an action against the real owner for forcible entry, there was evidence that the occupation of the plaintiff began by the permission of the defendant, and also that the latter came from time to time to see the plaintiff and went on the land with him, and told him what trees to lop and what repairs were required. *Erle*, C. J., told the jury if they believed that evidence they should find for the defendant. His Lordship observed that it might be taken that the plaintiff had the beneficial occupation for more than twenty years, and that if that would give him a title he would give him leave to move, but that in his judgment every time the defendant put his foot on the land it was so far in his possession that the statute would begin to run from the last time he put his foot on it. The jury found for the defendant, and the plaintiff had leave to move. This he did, but without effect. The case, however, in that stage does not appear to be reported. It may, perhaps, be thought that *Erle*, C. J., went almost too far in his ruling, because the acts of ownership exercised by the defendant may be considered as consistent with the plaintiff's possession, and hardly to bring the case within the principle of *Randall v. Stevens*." And the learned writers, while thinking that the language of *Erle*, C. J., was scarcely consistent with *Randall v. Stevens*, add, that the verdict would still seem to be right, "because the acts of ownership were clearly such as to determine the tenancy at will, and it may fairly be inferred from the plaintiff being allowed to remain in as before, that a new tenancy

Greenshields
v.
Bradford.

Judgment.

(a) 3 F. & F. 49.

at will was created every time the defendant (the owner) left." We want in this aspect of the case only the creation of one new tenancy at will, for the entries as well by the agent as the owner, were within ten years before the commencement of this suit; and they and what was done upon those occasions, were more unequivocal acts of ownership, than were those in the case of *Allen v. England*. There is besides, the paper of the 16th of August, 1878, which is an acknowledgment in writing sufficient within the statute, being before any extinguishment of title by defendant's possession. That however is not necessary to the plaintiff's case, as the bill was filed within the ten years, 19th of December, 1878. It is, however, material in this way; the defendant objects that the plaintiff does not shew title to the lot. The same objection was made in *Doe Boulton v. Walker* (a); but there being in that case, as in this, a document and acts by the defendant which were a recognition of the plaintiff's title, it was held that the defendant could not put the plaintiff to proof of title. I may add, that so utterly without merit is the case of the defendants; so dishonest their defence, that I should at any rate have given the plaintiff leave to prove his title either by affidavit or by an inquiry before the Master. Judgment.

The case of the defendant *James Jenkins* has yet to be dealt with. He sets up that he is a purchaser for value without notice. Shortly after the signing of the paper of the 16th of August there was a negotiation between *Bradford* and *Barker*, as agent of the plaintiff, for the purchase by the former of the 200 acres, *Bradford* saying he believed he had found a purchaser for it; and *Barker* at his request drew up an offer of purchase for \$3000, and which is dated the 23rd of August, 1878. This paper *Bradford* did not sign, but says he believes he would have signed it,

(a) 8 U. C. R. 571.

1881.

Greenshields
v.
Bradford.

1881. but that he was advised not to do so by *John Jenkins*.
 On the 9th of the next month *Bradford* and wife
 executed a conveyance of the whole 200 acres to *James*
Jenkins who is his grandson; the consideration being
 one dollar, and the support of *Bradford* and his wife
 during the remainder of their lives; and *Bradford* in
 his evidence says that *Jenkins* has supported them
 ever since. *Bradford* is an extremely old man, said
 to be over ninety years of age, and his wife nearly of the
 same age. The whole transaction savours of trickery.
 In my opinion it cannot succeed.

Greenfields
 v.
Bradford.

An answer setting up this defence must shew, what
 it would be necessary in England to shew by plea.
 This answer does not allege that *Bradford* was seised
 or pretended to be seised of the land conveyed, when
 he executed the conveyance, nor could it be so alleged
 with truth; it does not allege that *Jenkins* believed
 that *Bradford* was seised in fee, he only denies notice
 of alleged agency; it does not allege that *Bradford*
 was in possession, and could not so allege with truth,
 except as to a very small portion. As to consideration,
 the answer alleges generally that the purchase was
 for a valuable consideration; but is silent as to pay-
 ment, *Bradford's* evidence does not supply the defect,
 for it was necessary to allege that *Jenkins* had not
 notice of the plaintiff's title or claim, before payment
 of purchase money, a fact that *Jenkins* has neither
 set up nor proved.

Judgment.

He has not therefore brought himself within the
 protection accorded to an innocent purchaser for value,
 and stands therefore upon the same footing as *Brad-*
ford himself; and as to *Bradford* there being, and
 having been, before the purchase by *Jenkins* a recog-
 nition by *Bradford* of the title of the plaintiff, it
 will be taken to be a recognition of legal title in the
 plaintiff, against which title a plea of purchase for
 value would be of no avail. It appears that the taxes
 on the whole lot have from first to last been paid
 by the plaintiff.

No difficulty is created in my mind by the paper of 1881. the 16th of August; for assuming that it created a valid agreement for giving to *Bradford* and his wife a tenancy for life of the piece of land then occupied by him, he on his part agreeing to render certain services which may be taken to be in lieu of rent; his sale to *Jenkins* and his transfer, so far as he could transfer to him the possession and ownership of the land, was a repudiation on his part of the agreement of August, and a forfeiture of any rights that otherwise he might have under it. Besides, neither he nor his co-defendants make any claim under that agreement by their answer, but set up a case altogether inconsistent with such a claim.

Greenhields
v.
Bradford.

The plaintiff is, in my opinion, entitled to the relief prayed by his bill, and the decree will be with costs against all the defendants. Judgment.

1881.

MCGEE V. CAMPBELL.

Insolvency—Fraudulent omission from schedule—Fraudulent intent.

The omission by an insolvent from his schedule of assets of any property or stocks, in order to render him liable to the consequences provided by the 56th and 140th sections of the Insolvent Act, must be shewn to have been so omitted with a fraudulent intent.

A firm consisting of three members having become insolvent, the members thereof procured the usual discharge, which, so far as *C.*, one of the members was concerned, was impeached by a creditor of the firm, on the ground that *C.* had omitted from his schedule certain railway shares, which it appeared had been allotted to *C.* at the original organization of the company in the same manner as shares were allotted to other persons, and marked paid-up shares, no money consideration however having been paid by the allottees, and no scrip issued for the shares, such persons being appointed directors of the undertaking and receiving no other compensation for their services. The shares however had not any money value whatever, and *C.* in his evidence swore that he had not thought of this stock when making up his schedule of assets, so utterly valueless was it. The Court [*SPRAGGE, C.*,] being of opinion that the excuse offered by *C.* was not untrue, held that there was no fraudulent or even wilful omission in respect of such stock.

Prior to the time of *C.* making up his schedule he had, (during the absence of the president of the road in England for about a year endeavouring to raise funds for carrying on the undertaking,) acted as Vice-President and rendered services for which he hoped at some time to receive some compensation, but no promise, express or implied, had been made to him; subsequently, however, and after *C.* had applied for his discharge, a resolution was passed, granting him a sum of \$5,000, which was given more as a gratuity, and with a view of relieving him in his distress, than as a payment of a debt, and *C.* was unaware of the resolution of the board granting this money until he had obtained his discharge.

Held, that under the circumstances, it could not be considered there was in strictness any debt due to *C.*; and in any event that the non-insertion of the money in the schedule was not a fraudulent concealment within the meaning of the Act.

At the date of the insolvency a large number of shares of another railway was held by *C.* as trustee, such shares being of actual pecuniary value to *C.* as enabling him to be appointed a Director of the company, and for some years he received a salary as Director. The stock was shewn to have been worth about from 7 to 15 per cent., not on account of any anticipated dividends, but as a qualification for the Directorate. At the date of the insolvency *C.*, according to the arrangement with the owners of this stock, was bound at any time he might be called upon to re-transfer it, in consequence of his

failure to "give value" to it, but he was not called upon to re-transfer, nor had he been at the time the cause was heard called upon to do so. He stated, however, in his evidence that he had been advised he could not properly insert this stock in his schedule of assets. Subsequently to the date of the deed of composition and discharge, and the filing of the certificate of the assignee, but eight days prior to the order of confirmation by the Judge, *C.* acquired as his own property a portion of this stock.

Held, that this omission to bring such after-acquired stock in by a subsequent schedule of assets, was not a case of fraudulent concealment; and the bill by reason of the serious nature of the charges which the plaintiff must have established before he could succeed, was therefore dismissed, with costs.

1881.

McGee
v.
Campbell.

This was a suit instituted by *James McGee*, against *Charles J. Campbell*, *Walter G. Cassels*, and *Edward S. Cox*, who had been carrying on business as bankers and brokers in the city of Toronto, under the name and firm of *Campbell & Cassels*, and alleging that they had become insolvent, and had made an assignment of their estate; and that on the 2nd of October, 1878, they had executed a deed of composition and discharge: that the plaintiff, being a creditor of the said firm, had proved his claim against their estate, and had obtained payment of a certain sum in discharge of the claim; and it was then agreed that the plaintiff should assign and transfer his claim to the defendant *Alfred W. Smith*, and which he did accordingly execute.

Statement.

The prayer of the bill was, that under the circumstances stated in the bill, and which are sufficiently set forth in the judgment, the deed of composition and discharge might be declared void as against the plaintiff; and that the transfer to the defendant *Smith* might be set aside, and the plaintiff declared a creditor of the said firm of *Campbell & Cassels* for the full amount of his claim, and that the defendants, other than *Smith*, might be ordered to pay the same.

The defendants, other than *Smith*, severally answered the bill, which as against *Smith* had been taken *pro confesso*.

1881. The cause came on for the examination of witnesses and hearing at the sittings before *Spragge, C.*, at Toronto, in the Spring of 1880.

McGee
v.
Campbell.

Mr. *Blake*, Q.C., for the plaintiff.

Mr. *MacLennan*, Q.C., for the defendant *Campbell*.

Mr. *L. W. Smith*, for the defendant *Cassels*.

Mr. *McCarthy*, Q.C., and Mr. *Foster*, for the defendant *Cox*.

Mar. 12th. SPRAGGE, V. C.—The 17th section of the Act prescribes to the insolvent the duty of making a true and full statement of all his assets. The 56th and 140th sections provide what shall be the consequences of an omission to do this. The 140th section attaches penal consequences to such omission.

Judgment. The consequences, however, whether penal or civil, attach only where the omission has been with a fraudulent intent. It is, therefore, by this test that the omissions of Mr. *Campbell* are to be tried.

The evil to be remedied was the concealment by the insolvent from the creditors of something, of some value to the creditors, as well as to the insolvent; of something from which if disclosed, they would get a larger dividend than they would otherwise obtain; and the non-disclosure of this does not *per se* involve the consequences provided in the Act. There must be not only the fact of non-disclosure, but the non-disclosure must be with a fraudulent intent.

I will take first, the case of the stock in the Credit Valley Railway Company. The schedule of partnership assets sets out ten shares of such stock as part of the assets of the partnership; and the schedule of the individual assets of Mr. *Campbell* sets out none. The inference would be that the ten shares were the whole of the

stock of the Company possessed either by the partnership or the defendant. It appears in evidence that besides these ten shares (which stood in the name of Mr. *Campbell* but were paid for by the partnership,) 160 shares were, at the original organization of the Company, allotted to Mr. *Campbell*. Several shares being also allotted to other members of the Company, and marked as paid-up shares, without any pecuniary consideration being paid by those to whom they were allotted. This, which upon the face of it looks like a very strange transaction, is thus explained in the evidence of Mr. *Laidlaw*, the projector, promoter, and President of the road. The persons to whom these shares were allotted, were appointed Directors of the Company, and these shares, together with certain bonds of the Company, were allotted to them by way of compensation, for their then present and for future services, so as to leave intact the municipal bonuses and other aid to, and other means of the Company, for the construction of the road; and in fact Mr. *Campbell* and the other Directors of the Company have received no other compensation for their services as Directors up to the present time, with the exception in the case of Mr. *Campbell*, which I will notice presently. This allotment of shares went no further than a resolution that they should be allotted, and their entry in the stock book. No scrip was issued for them.

In 1878 the road was in great difficulties. At the date of the insolvency of *Campbell* and *Cassels*, the President had been about a year in England endeavouring to raise money for the further prosecution of work upon the road, which had been for some time at a stand-still for want of funds. The stock of the Company had no market value, and, as appears by the evidence, no money value whatever.

Strictly speaking, Mr. *Campbell* should have been careful to omit nothing from his schedule of assets however small, or uncertain, or remote the value might

1881.

McGee
v.
Campbell.

Judgment.

1881.
McGee
v.
Campbell.

be. What he says as to this omission is, that he did not think of this stock. Such an excuse should be received with hesitation and caution. Still looking at the several circumstances to which I have adverted, I do not feel that I ought to come to the conclusion that the excuse that he offers is untrue, and if not untrue, there was no fraudulent or even wilful omission.

There is another omission charged in regard to Mr. *Campbell's* dealings with the same Company. At the date of Mr. *Campbell's* schedule, there was, in my opinion, no debt due to him from the Company. He had, it may be, a claim upon the consideration—it may be upon the justice of the Company for services rendered by him as Vice-President during the absence of the President in England, and he hoped, as he says, that some compensation for these services, would be made to him, but there was no promise express or implied, that any compensation should be made; and when compensation was made to him, it was made either as a gratuity which, under peculiar circumstances, might properly be given to him than a payment of a debt. The first sum placed at his disposal was given to relieve apprehended want; and when it was largely increased, and increased beyond the intention of the President, it was, as I gather from the evidence, placed upon this by the Directors, that sympathizing as they did with their Vice-President, whose failure in business involved the loss of his means of living, they ought not to leave him destitute; but to give him compensation which, but for his misfortunes and his necessities, they would not have felt it to be necessary to give to him. One thing is certain, that if it had been presented to the minds of the Directors that what he so received could be considered as a debt, for which he was to account to his creditors as an asset, the money would never have reached his hands at all; or if at all, only in such a way that it could not be reached by his creditors; and

Judgment.

1881.

McGee
v.
Campbell.

in regard to the larger amounts this is to be said, that it appears to have been intended, and to have been the fact, that Mr. *Campbell* was not informed of the resolution for granting them till after he had obtained his discharge. In my opinion there was not in strictness any debt in the case. I feel satisfied at any rate that the non-insertion of these moneys in the schedule was not a fraudulent concealment, within the meaning of the Act.

• A large portion of what was thus given to *Campbell* was in the shape of two notes of the Company, each for \$2,000, and which notes were handed by *Campbell* to Mr. *Robert Hay*. *Hay* was a Director of the Railway Company and claimed also upon the estate of *Campbell* and *Cassels*, as indorser of notes to the amount of \$5,000 for their accommodation. There *might have been* a promise from *Campbell* to *Hay* to give him a share of the gratuity voted to him by the Directors if he would support the vote, and *there might have been* a like promise to *Hay* if he would join in the deed of composition and discharge; but both these are negatived by the evidence of *Campbell*, and the former by the circumstances. *Hay* himself was not called as a witness. No case is made by the bill in respect of this matter, but some evidence was given upon it, and if it had been of such a nature as to make a case within the statute, it would have been proper to allow an amendment. Judgment.

A case is made by the bill in respect of stock in the Victoria Railway Company, but this was abandoned at the hearing.

A case is also made in respect of stock standing in the name of *Campbell* in the Northern Railway Company, and that case appeared to me at the hearing to be more formidable than any of the others. A large number of shares in that Company stood in the name of *Campbell*, as far back as 1874, at first in his own name individually, (and stood in that shape at the

1881. date of the insolvency of *Campbell & Cassels*.) They afterwards stood in his name as trustee. They were of actual pecuniary value to *Campbell*. They enabled him to be appointed a Director of the Company, and he sat at the Board for some years receiving a salary as Director. And there is evidence that the stock has had a money value in the market; that there have been sales of stock within eighteen months before the 29th June last, at from 7 to 15 cents in the dollar, its value consisting not in the production of any dividend, but in what it might be worth as a qualification for the directorate. And there is evidence that more recently *Campbell* acquired as his own absolutely a certain proportion of this Railway stock, which he had theretofore held as trustee; and it was strongly pressed upon me at the hearing that, at any rate, the stock so acquired as his own was an asset which he was bound to insert in his schedule, and that his omission to do so was a fraudulent concealment with-
Judgment. in the act.

These shares came into the hands of *Campbell*, a portion of them from a Mr. *Beatty*, and the rest from a Mr. *Roberts* in trust. They were treated as of little, if any value; but it was supposed that *Campbell* might be able in some way, in what way is not explained, to give them some value. A time was limited for his accomplishing this, and if he accomplished it within the time limited, he was to have, as his own, one half of the stock transferred to his name by way of compensation.

At the date of *Campbell & Cassels* going into insolvency, the time limited had long elapsed, and *Campbell* stood bound at any time that he might be called upon to re-transfer the stock. In fact he was not called upon; and he continued his endeavours "to give value" to the stock, hoping it would seem that the arrangement with the owners would be regarded by them as still on foot. At the date of the insolvency

he was still unsuccessful; and so far as appeared he was still so up to the hearing of the cause. He says in his evidence that he was advised that he could not properly insert this stock in his schedule of assets.

1881.

McGee
v.
Campbell.

The date at which he acquired as his own a portion of this stock was February, 1879; the exact date the 21st. The date is material in connection with the dates of the proceedings in insolvency. The schedule of the assets and liabilities of *Campbell* as they stood at the date of the firm going into insolvency, 16th of September, 1878, verified by *Campbell's* affidavit, and used in the insolvency proceedings, is before me; it is not marked as filed, the only date I find is that of the swearing of the affidavit, which is the 2nd of October, 1878. The deed of composition and discharge bears the same date. The certificate of the assignee is dated the 20th of December, 1878, and was filed on the following day. The petition for confirmation has no date. An affidavit of verification is marked, sworn on the 29th of January, 1879. An affidavit verifying statements annexed to it is marked as sworn to by *Campbell* the 26th of February, 1879, and the order for confirmation by the County Court Judge is dated the 1st of March, 1879. The railway stock acquired as his own by *Campbell* was therefore acquired after the deed of composition and discharge, after the making and filing of the certificate of the assignee, and after the petition to the County Court Judge for its confirmation, but before the date of the order of confirmation by the Judge.

Judgment.

The question has arisen in several cases in England to whom property belonged, acquired by a bankrupt between the commissioner's order of discharge and the order of discharge by the Court, under the Act of 1861, and between the close of liquidation and the order for discharge in other cases; and in each case such property was held to belong to the bankrupt and not to the assignee. The earliest of these cases was *ex parte*

1881. *Bell in re Laforest* (a), before Lord Westbury. The later cases are *Ebbs v. Boulnois* (b), and *In re Bennett's Trusts* (c). In the first of these cases the question is fully discussed by Lords Justices *James* and *Mellish*, and the grounds of their decision apply to the provisions of our Insolvency Act of 1875.

McGee
v.
Campbell.

It is not necessary to go so far as is gone in the cases to which I have referred, for if it was a question of reasonable doubt, whether such after acquired property did not belong to the insolvent, it would be out of the question to hold his omission to bring it in by a subsequent schedule of assets to be a case of fraudulent concealment.

Judgment.

There are several American cases upon the question, what are omissions which are not fraudulent and what amount to acts of fraudulent concealment; they will be found collected in Mr. *Blumenfeld's* book on Bankruptcy, p. 10, and Mr. *Bump's* book on the same subject, Sec. 5110. The cases shew that there must be wilful and fraudulent concealment to bring a case within the Act. There is also the case of *In re Jones* (d), where in the opinion of *Wilson, J.*, now C. J., the insolvent had omitted from his schedule a contingent interest in land which properly ought to have been inserted. The insolvent swore that he was advised to omit it by his legal adviser, and the learned Judge held that the omission was not an act of fraud.

I should say, for myself, that our Insolvency Act itself shews plainly that it is only in a case of clear unmistakable fraud that it is meant to apply; not to a case where it may be attributable to mistake or forgetfulness. Sec. 56 speaks of "fraudulent retention and concealment." Sec. 140. "If, with intent to defraud he wilfully and fraudulently omits from his schedule any effects or property whatsoever." But

(a) 32 L. J. Bankruptcy 50.
(c) *Ib.* 490.

(b) L. R. 10 Chy. 479.
(d) 4 Prac. Rep. 319.

what particularly marks the mind of the Legislature upon this point, are the very serious penal consequences attached to the acts and omissions (of the latter of which fraudulent concealment of assets is one) enumerated in the Act.

1881.

McGee
v.
Campbell.

A case for setting aside an order of discharge for any of these acts of omission or commission should, in my opinion, be supported by evidence of the guilt of the insolvent in the matter charged against him, as cogent and satisfactory as would be sufficient and proper for the conviction of the insolvent if he were on his trial on a criminal charge for these acts.

To recur for a moment to the omission by *Campbell* to insert in his schedule the 160 shares of Credit Valley Railway Stock allotted to him. I have given Mr. *Laidlaw's* explanation of how they came to be allotted. Then what about this stock at the date of the insolvency? The enterprise itself was in a state of collapse; the work upon its construction at a standstill for want of funds; and the President had been just about a year in England using every effort to raise funds to go on. The evidence is that the stock was of no value at the date of the insolvency. There is no evidence that it was of any value, and a question is made whether it can be true that he did not think of it, and whether I must say that he did think of it notwithstanding his denial. It is not likely that he had forgotten it; am I to say that his oath that he did not think of it is incredible? It was unquestionably his duty to set down in his schedule all his assets. In doing so, however, he would naturally think of what would be of some value to his creditors, and if this stock occurred to his memory it might be for a moment only, to be discarded immediately as a thing of no value whatever. If *Campbell's* explanation had been that he had not set it down as he considered it worthless, I should have felt no difficulty about it, except the difficulty created by his setting down the ten

Judgment.

1881. shares. As to that this is to be said, that money of the partnership had been expended in the purchase of the ten shares; and no money, either his own or that of the partnership, in the acquisition of the other.

McGee
v.
Campbell.

But after all the question is not whether *Campbell's* statement that he did not think of these shares be true or untrue; for if I were to come to the conclusion that it was untrue, that would not decide the true point against him; for we must take the fact, that the stock was of no value. Assume then for a moment that he did think of this stock, worthless as it is sworn to be, having been allotted to him; his omission to insert it as an asset in his schedule cannot be taken as done wilfully and fraudulently, and with intent, as it is reiterated in the statute, to defraud. It is unnecessary in this view of the matter to find whether *Campbell* in making up his schedule really did or did not think of this stock. It is possible that he may have forgotten it, or at any rate not have thought of putting it in his schedule, and I decline gratuitously, because unnecessarily, in the face of his sworn statement that he did not think of it, to say his statement is untrue.

Judgment.

There remains the question of costs. I think that the defendants, other than *Campbell*, are certainly entitled to their costs. As to *Campbell* I have hesitated as to whether he should receive his costs, as the omission of the 160 shares in the Credit Valley Railway from his schedule might possibly have given occasion to the suit, but there was the fact, as to which the plaintiff gives no contradictory evidence, that these shares were of no value; and the circumstance, to which he should have given its due weight, that he could only succeed upon establishing against *Campbell* fraud of the gravest character.

The bill is therefore dismissed, with costs.

HALLERAN V. MOON.

1881.

Statute of frauds—Promise not to be performed within a year—Executed consideration—Promise to leave money by will—Corroborative evidence.

The Court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement where the consideration therefor has been executed.

The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was subject to a mortgage, saying that if he would do so and have the property conveyed to his (plaintiff's) wife, he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the instalments on the mortgage and the plaintiff was compelled to pay it himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for them; that he would pay plaintiff \$150 a year for ten years, and bequeath to his wife \$1,000. By the will, however, only \$100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement, or for payment of damages by reason of the breach thereof. The only direct evidence was that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for \$260 and \$200, respectively, expressed to be on account of money left her by her father's will; and witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in his wife's name, and that he was making the payments as the plaintiff had so taken the deed:

Held, that there was sufficient corroboration of the evidence of the plaintiff as required by the statute (R. S. O. ch. 62), and that the second agreement or promise by the testator was not voluntary, the former promise, even if barred by the statute, being a sufficient consideration, as well as the conveyance to the daughter made in pursuance of it; and a decree was made for payment of the legacy of \$1,000, less the two sums of \$260 and \$200, with interest from one year after the death of the testator on the balance.

Examination of witnesses and hearing at Cobourg.

The plaintiff being a tenant farmer of small means, in December, 1869, married the defendant *Dinah C. Halleran*, who was a daughter of one *Richard Cullis Moon*. The brother of the plaintiff was the owner of a farm of 100 acres, which was subject to a mortgage to the Church Society of Toronto. Shortly after his marriage the plaintiff contracted with his brother to purchase 50

Statement.

1881.
Halleran
v.
Moon.

Statement

acres of this farm, on which he paid \$58 in cash, and the balance of purchase money was to be applied in reduction of this mortgage. Thereupon the plaintiff's father-in-law requested him to buy the whole farm, though the plaintiff's means were insufficient for that purpose, and agreed verbally that if the plaintiff would make the purchase, and would have the lands conveyed to his wife, he (the father-in-law) would pay off the mortgage upon the property. The plaintiff acting upon this suggestion bought the whole 100 acres, and procured a conveyance of it to be made to his wife, but when the mortgage became payable the father-in-law repudiated his agreement, and the plaintiff, in order to save the farm, was compelled to borrow money on another mortgage to pay off the mortgage to the Church Society. About eight years afterwards, it was alleged, the father-in-law regretted his refusal to carry out the agreement, and made another verbal agreement to pay the plaintiff \$150 a year for ten years to enable him to pay off the new mortgage, and also to bequeath to his daughter (the plaintiff's wife) \$1,000. By the will of the father-in-law, however, a sum of only \$100 was bequeathed to the plaintiff's wife, and no mention was made in it of the agreement with the plaintiff, nor was any provision made for its fulfilment. The plaintiff claimed that he had been induced by the promise and agreement of the father-in-law to assume a responsibility in the purchase of the whole farm which otherwise he would not have assumed, and had no possibility of discharging, and that he had fully executed the agreement on his part by having the conveyance of the farm made to his wife; and asked the court to compel the specific performance by the estate of the father-in-law of the new agreement, or to award damages for the breach. The defendant *Moon* was the executor named in the will.

Mr. *Moss* for the plaintiff.

Mr. *Boyd*, Q. C., contra.

The other facts of the case and the authorities cited are mentioned in the judgment. 1881.

Halleran
v.
Moon.

Jan. 12th.

SPRAGGE, C. The plaintiff is the husband of the defendant *Dinah C. Halleran*, and she was a daughter of *Richard Cullis Moon*, of whose will the defendant *John Jennings Moon* is the executor.

The plaintiff's case is, that he married the female defendant in December, 1869, that on the 29th of the following January he contracted with his brother *Michael Halleran*, who was the owner of the east half of lot 6, 8th concession of Hope, for the purchase of the north half thereof, and an agreement of the above date for such purchase is produced; that the east half of said lot was subject to a mortgage to the Church Society of the Diocese of Toronto for about \$850; that shortly afterwards the father of the plaintiff's wife suggested to him to purchase the whole of the east half, and promised that if he would do so, and would have the conveyance made to his daughter, he would himself meet the payments on the mortgage; that he, the plaintiff, agreed to this, and accordingly purchased from his brother the south half of the east half of the lot, and had a conveyance made of the whole east half to his wife, and such conveyance is produced, dated the 26th of March, 1870. Judgment.

His case further is, that his wife's father did not meet the payments on the mortgage as agreed, but refused to do so, and that he himself, with his wife, raised money upon mortgage of the land, wherewith the mortgage to the Church Society was paid off. That several years afterwards (the evidence places it in or about 1877), the father acknowledging that he had not kept his promise, and expressing regret for it, said to the effect that he would do more for them, that he would pay the plaintiff \$150 a year for ten years, and leave \$1,000 to his daughter, the plaintiff's wife, by will. The plaintiff accounts for his inaction in respect

1881. of the payments on the mortgage agreed to be made by his father-in-law, by saying, that he was dissuaded by his wife from suing him, lest doing so should anger him, in short that it would be better policy not to do so. The father-in-law died in February, 1879.

Halloran
v.
Moon.

Mr. *Boyd* contends that the first alleged promise to meet the Church Society mortgage is barred by the Statute of Limitations, and further that being a promise not to be performed within a year, and not being in writing, it was void under the Statute of Frauds; and in support of the latter objection he refers me to *Nicholls v. Nordheimer* (a), *Davies v. Appleton* (b), and *Jackson v. Yeomans* (c).

Judgment.

In the two cases in the Common Pleas the English cases are elaborately reviewed, and it is conceded that it appears from the cases that where there was an executed consideration for the promise, the promise, though not to be performed within a year, is not within the statute. In the case in the Queen's Bench the late Chief Justice *Harrison* expressed some doubt upon the point, but there was no decision upon it. I think the rule is correctly stated by Mr. *Browne* in his book on the Statute of Frauds, sec. 117, where he says, "Where a verbal contract is completely executed by one party, the consideration can be recovered from the other notwithstanding the Statute of Frauds"; or as it is put in some of the cases, such a case is not within the statute.

In the case before me the consideration on the part of the husband for what was promised by the father-in-law, was the purchase by the husband of the south half of the east half of the lot, and the conveyance of the whole of the east half to the daughter, and that became an executed consideration upon the purchase being made and the conveyance executed.

(a) 22 C. P. 48.

(b) 25 Ib. 376.

(c) 39 U. C. R. 280.

With regard to the Statute of Limitations, it may admit of doubt. I have not before me the mortgage to the Church Society, which it is alleged the father-in-law was to pay off. It is spoken of in the evidence as payable by instalments, but at what dates payable, and whether the whole became payable upon default in payment of one instalment, or of interest, does not appear. The running of the statute as to the whole or as to a part would depend upon how the mortgage is made payable, and I should desire the mortgage to be put in if the case turned upon these particulars; but the plaintiff's case rests upon the further promise made in 1877. As to this promise Mr. *Boyer's* contention is, that it was without consideration, but to this I cannot accede. The previous promise to pay off the mortgage, that promise being founded upon a valuable consideration and enforceable at law, was, whether barred by the statute of limitations or not, a sufficient consideration for the subsequent promise. See *Addison on Contracts*, p. 20; *Chitty on Contracts*, 10th ed., p. 37; Judgment. *Wennall v. Adney (a)*, *Eastwood v. Kenyon (b)*.

Further, it would appear that the conveyance to the promisor's daughter made at his request, was a sufficient consideration to support the promise of 1877 as binding in law upon the promisor, and would be so independently of the promise to pay off the mortgage.

For this a case referred to in *Hunt v. Bate (c)*, is an authority. An action on the case was brought upon a promise of £20, made to the plaintiff by the defendant in consideration that the plaintiff, at the request of the defendant, had taken to wife the cousin of the defendant, and that was adjudged to be "good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued the request of the defendant." I refer also to *Marsh*

(a) 3 B. & P. 247.

(c) 3 Dyer. 272, at 272 b.

(b) 11 A. & E. 438.

1881.
Halleran
v.
Moon.

1881. *v. Rainsford* (a), and the same case under the
 name of *Marsh v. Kavenford* (b), and to *Osborne v.*
Halleran
v.
Moon.
Rogers (c).

In my opinion, therefore, the legal objections to the plaintiff's case fail. Upon the facts we have the evidence of the plaintiff himself, and of his wife, with some evidence in corroboration—that of *John McCormick*, as to the promise of 1870, and that of *Thomas Hurd*, as to the subsequent promise. *McCormick* says he was a neighbour of the deceased, and was intimate with him, and in the habit of talking to him about his affairs; that in 1870 he said to him "*Tommy* (*Thomas* is the name of the son-in-law), is a good worker, and you ought to help him. He said, I have agreed to pay for that place for him, provided he takes the deed out in *Dinah's* name."

Thomas Hurd says: "In 1878 I was hired with Mr. *Moon*, and had a conversation with him about *Halleran*. He said he was paying payments on the place for *Thomas*, as he had taken the deed out in *Dinah's* name."

Judgment.

According to both these witnesses the deceased did not state accurately what in the first instance he had agreed to do, and in the last instance what he was doing; or they may not remember quite accurately. It certainly does not quite agree with what the plaintiff and her husband say that the deceased originally agreed to do, or afterwards agreed to do, by way of substitution for his original agreement; but both of these witnesses agree as to this statement, that he was to do something in the way of money payments, and that the reason of his so doing was the conveyance of the land to his daughter, and in this way and to this extent their evidence is corroborative of that of the plaintiff and her husband.

(a) 2 Leo. 111.

(b) Cro. Eliz. 59.

(c) Abridged in the ed. of 1871 from the old ed. of *Saunders' Reports*, Vol. 1, p. 357.

I think the evidence of the plaintiff and her husband as to the original agreement to pay off the mortgage to the Church Society is to be credited, and that that agreement was made upon the conveyance being agreed to be made to the daughter upon the suggestion of the deceased. I think further, that the evidence establishes a substituted agreement, and that it was to this substituted agreement that the deceased referred in what he said to the witness *Hurd*.

1881.

Halleran
v.
Moon.

In this connection I may refer to the two peculiarly worded receipts to be found entered in the note book produced. The first is as follows :

"Received from *Richard C. Moon* the sum of two hundred sixty dollars thirty cents, being a part of my fortune left me on my father's will.

"DINAH C. HALLERAN,"
"THOMAS HALLERAN."

"Date, Feb. 16, 1878."

The second runs thus :

"Received from *Richard C. Moon* the sum of two hundred dollars, being a part of my fortune left me by my father.


Judgment.

"DINAH C. HALLERAN."

"Dated Nov. 3rd, 1878."

The will is dated the 18th May, 1878, and contains a bequest to the plaintiff of \$100; and in the November after that he makes her a payment of \$200, as "being a part of my fortune left me by my father."

These receipts are in the handwriting of the plaintiff, and written it is said, and I think said truly, in words dictated by him. The second receipt rather negatives the idea of the \$100 legacy being the whole of the plaintiff's fortune. It rather indicates that there was something else to which he chose to give that name; and yet the words *left me by my father* rather point to a bequest by will. I do not attempt to explain this piece of dealing between the parties. It makes but little one way or the other except in this, that it is a

1881.  piece of documentary evidence rather against the plaintiff's position, that besides the \$1,000 to be paid or left by will to the plaintiff, there was to be a payment of \$150 a year to the husband. If this annual payment to him had been intended the receipts would naturally have been on that account (to that extent at any rate), and would have been expressed differently.

Halloran
v.
Moon.

Judgment. There is no corroboration other than that of the husband as to the *amount* to be paid or left to the plaintiff under the substituted agreement. The evidence of the husband is, however, admissible upon that point, and I think is to be believed; and an agreement to pay or leave that amount is probable, in view of the means of the deceased, as deposed to in evidence, and of the amount of property disposed of by his will.

The result is, that the 'plaintiff' is entitled, in my opinion, to payment of \$1,000, less the payments of \$260 and \$200, with interest on the balance, from one year after the death of the deceased.

The decree will be with costs.

1881.

CAMERON V. WELLINGTON, GREY, AND BRUCE RAILWAY COMPANY.

Farm crossings—Parol agreement—"Make and maintain," construction of.

The owner of land conveyed a right of way over his land to the defendants in 1869, and the deed contained the following stipulation: "The company to make and maintain a farm crossing, with gates at the present farm lanes, the fence at crossing to be returned as much as possible." *R.* the company's engineer treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised if he should find a second crossing necessary he would, so far as in him lay, get it done, and the deed was executed upon this understanding.

Held, [reversing the decree of PROUDFOOT, V.C., ante vol. xxvii p. 95.] that the defendants could not be compelled to make a second crossing for use in winter; and that upon the construction of the words above set forth they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow.

PROUDFOOT, V.C., dissenting.

This was a re-hearing of the decree pronounced by *Proudfoot*, V. C., reported ante Volume xxvii, page 95; The facts appear sufficiently in the former report and in the judgment.

Mr. *Boyd*, Q. C., for the plaintiff.

Mr. *Bethune*, Q. C., for the defendants.

SPRAGGE, C.—It appears from the evidence in this case, which I have read over carefully more than once, that the subject of there being a second crossing on the farm of the late *Donald Cameron*, of which the present plaintiff is devisee, had been the subject of negotiation between *Cameron* and Mr. *Ridout*, engineer in the construction of the road, and some other gentlemen named by the present plaintiff in his evidence, Mr. *Bentley* and Mr. *York*, between March and August, before the execution of the deed. The deed is

Judgment.

Cameron
v.
Wellington,
Grey, and
Bruce
R. W. Co.

1881. dated the 23rd of August, 1869. The only stipulation in the deed is in these words: "The company to make and maintain a farm crossing, with gates at the present farm lane, the fence at crossing to be returned as much as possible." The matter was, as the plaintiff says, closed with Mr. *Ridout*, who appears to have been the agent of the company, for procuring the right of way from *Cameron*, and probably from others.

The evidence does not shew what authority Mr. *Ridout* had. He certainly did not, in the discussion on the occasion of the execution of the deed, assume to have the authority of the company, to stipulate for a second crossing; and having the deed with him for execution by *Cameron* he disavowed having authority to insert in it a stipulation for a second crossing. Both Dr. *Clarke* and the plaintiff testify to this. The former, whose good offices had been requested by Mr. *Ridout* to assist in getting *Cameron* to convey the right of way, says: "I did not say that I had'n't authority to put it in the deed about the two crossings, I think *Ridout* said something of that kind; that he had'n't power, or something." And the plaintiff says: "I knew the stipulations about second crossings was not to be put in the deed; they were asked to put it in, but Mr. *Ridout* said he had no authority to put it in;" and he adds, "My father signed without its being put in."

Judgment.

My conclusion is, that Mr. *Ridout* had not and did not claim to have authority to bind the company in the matter of the second crossing. If he had not authority, then, if he had ever so distinctly agreed that a second crossing should be given, it would be an agreement by an agent outside the scope of his authority, and an agreement therefore not binding on his principal. The decree, which is for a specific performance of that agreement, can, of course, only be supported in case of there being established against the company the fact of the agreement, and of the authority of the agent to make it.

1881.

Cameron
v.
Wellington,
Gray, and
Bruce
R. W. Co.

It does not appear to me to make any difference as to the relief granted that the agreement may be placed upon the ground of additional consideration for the conveyance; for if the additional consideration be an agreement to do some act, the fact of the agreement and all that is essential to its validity must be proved in the same way as if it were a fact other than by way of additional consideration; otherwise the fact has no legal proof at all. I am unable, therefore, to agree in the propriety of the decree that has been made.

I have considered whether the plaintiff may not be entitled to some lesser relief than that granted by the decree: whether he and the railway company may not be relegated to their original positions before the execution of the conveyance; the plaintiff standing as an owner of land, entitled to compensation and to the ordinary remedy under the Statute to enforce it. He has been disappointed of that which he had great reason to expect; and which would have been of material advantage to him in the working of his farm. But, to get at that lesser relief we must set aside the conveyance; and I confess I am unable to see any sufficient ground for setting it aside. We have no evidence that amounts to proof of any fraudulent representation on the part of *Ridout* or any other officer of the railway company.

Judgment.

Cameron knew exactly what he was signing; that it was a deed stipulating for one crossing only. He was not deceived as to the extent of *Ridout's* authority; and therefore when it is said that he signed the deed with the understanding that, if necessary, he was to get a second crossing; and that *Ridout*, said if it was necessary he would see it done, it cannot mean more than this, that he, *Ridout*, an officer of the company, but still with limited authority—without authority to bind the company—if he should find a second crossing necessary would, so far as in him lay, get it done; and that the deed was executed upon that

1881. understanding. There is no pretence that it was not a perfect execution; that it was provisional upon anything; and if not, it could not be anything more than a personal assurance that *Ridout*, avowedly without authority to do more, gave to *Cameron*.

Cameron
v.
Wellington,
Grey, and
Bruce
R. W. Co.

According to the evidence *Ridout* expressed himself with a good deal of confidence, and probably he did so; but the evidence was given after the lapse of ten years, when the freshness of the recollection of the witnesses would naturally be effaced to some extent by time; and that of *Dr. Clarke* by so many years of professional avocations. The only other witness is the plaintiff himself, and it does not appear that either made any note of what passed; and *Mr. Ridout* is dead. So the evidence is not before us so satisfactorily as it might have been; and for this the plaintiff's father has been to blame, for the plaintiff's claim to a second crossing has, it appears, never been recognized by the railway authorities. There were some complaints to subordinate servants of the company, but they appear to have been for the non-removal of snow, rather than a claim for a second crossing.

Judgment.

The first letters put in are of February, 1879, and in the plaintiff's evidence there is a note of one to *Mr. Broughton* of February, 1877; it is not put in. I do not say that the delay *per se* should disentitle the plaintiff to relief; but it is a circumstance in the case. One would expect more promptness; and more decided, and more distinct action, if *Mr. Ridout's* utterances, not to say his personal assurances, were of so distinct a character as they are now stated to be. I cannot therefore see my way to the lesser relief which I have indicated as possible.

As to the obligation claimed to lie upon the railway company to keep the crossing, which is admittedly stipulated for in the deed, and its approaches clear of snow, that depends, primarily at least, upon the construction of the deed itself. The word "maintain" in the con-

nection in which it is used, "make and maintain a farm crossing," does not, as I interpret it, mean anything more than that the company is not only to make a crossing, but to continue it as such; not to close it up, or impair it, or so to change it as to alter its character as a farm crossing, and to keep it in repair. The word "maintain," used in *Sevenoaks, Maidstone, and Tunbridge R. W. Co. v. London, Chatham, &c., R. W. Co. (a)*, was used in a contract between two railway companies in a technical sense, and the question was, what constituted maintaining a railway. It does not assist us in construing the words used in this conveyance. Nor does its use, and the construction put upon it, in the *Edinburgh and Glasgow R. W. Co. v. Campbell (b)*, where there was an agreement by a company to erect and construct a bridge over a road leading to the property of an individual, the bridge to be thirty-five feet wide, leaving the road under it fifteen feet wide. The railway company, and another amalgamated with it, were about to widen the bridge to fifty-eight feet, the effect of which would have been to darken the road underneath. Lord *Westbury*, in the appeal of the case to the Lords, said he thought what was proposed to be done was inconsistent with the terms of the agreement entered into with the company, and the other Law Lords were of the same opinion. The word "maintain" was there interpreted as meaning the leaving things as they were.

If it had been intended that the company should keep the crossing clear of snow one would expect an agreement in terms to that effect, for its being blocked with snow was present to their minds, as appears by the evidence; and by the same evidence it appears that *Cameron* did not contemplate this crossing being kept clear of snow, for he did not contemplate its use at all during the period of snow, but the use

1881.

Coleman
v.
Wellington,
Grey, and
Bruce
R. W. Co.

Judgment.

(a) 27 W. R. 672.

(b) 9 L. J. N. S. 157.

1881. of a second crossing which he was endeavouring to procure.

Cameron
v.
Wellington,
Grey, and
Bruce
R. W. Co.

The word, apart from latent ambiguity, does not import such an act as the clearing away of snow; and if there be any latent ambiguity, from the position and conditions of the farm crossing to render parol evidence admissible to explain the meaning of the word as used, the evidence given negatives, as I think, the meaning attributed to it by the plaintiff.

I have quoted only a passage or two from the evidence. My brother *Blake* in his judgment, which I have had the advantage of seeing, has made extracts from the parts of it bearing upon the point in question, and I have myself read it repeatedly and very carefully.

It is, I confess, not without reluctance that I have come to the conclusion that the judgment of my brother *Proudfoot*, decreeing a second crossing to the plaintiff, cannot be supported.

Judgment.

BLAKE, V. C.—By an instrument dated the 23rd day of August, 1869, *Donald Cameron*, the original plaintiff, conveyed certain lands to the *Wellington, Grey, and Bruce Railway Company*. This deed contained this clause: "The company to make and maintain a farm crossing, with gates at the present farm lane, the fence at crossing to be returned as much as possible." Nearly ten years afterwards, on the 8th of March, 1879, *Donald Cameron* filed his bill against the defendants, thereby demanding that a second farm crossing be made and that the fence be returned. After the filing of the bill the fence was returned, but the defendants deny their obligation to make the second crossing demanded. It is clear, under the deed, that the defendants are not required to do so. Mr. *Ridout* who acted for the company is dead, and we are deprived of the advantage of his statement in the matter. It appears that the question of a second

crossing was not omitted through inadvertence at the time of the execution of the deed, for Dr. *Clarke*, who was produced as a witness to substantiate the case of the plaintiff, says: "I didn't say that I hadn't authority to put it in the deed about the two crossings. I think *Ridout* said something of that kind: that he had not power."

1881.

Cameron
v.
Wellington,
Grey, and
Bruce
R. W. Co.

The plaintiff in his examination says: "I was present when the deed was signed. I knew the stipulation about the second crossing was not to be put in the deed; they were asked to put it in, but Mr. *Ridout* said he had no authority to put it in. * * Mr. *Ridout* said he hadn't power to put a second crossing in the deed." The company limited its liability by the clause it inserted in the deed; the attention of the grantor was called to this and he asked for more. He was informed that Mr. *Ridout* had not the power to insert an additional stipulation in the deed, and he then gave some assurance to the grantor, which the plaintiff says satisfied him. I do not think it would be safe, after the lapse of ten years, and after the death of Mr. *Ridout* to constitute this assurance, if it were given by Mr. *Ridout*, into a stipulation which is to bind the company. They measured their liability by the instructions they gave their agent, who informed the grantor that he had authority to make the proposed addition; and I cannot think that it is proper at this date to cast upon the company the responsibility for the alleged promise which, not being given by the company, it is said was given by Mr. *Ridout*. It is urged the company are bound to remove the snow from this crossing when it accumulates. I am of opinion that the company are no more liable to remove the snow from these crossings than they would be to fill another crossing with snow in case the wind had drifted it away. The company are bound to make and maintain the crossing, but this does not involve the liability for months in the year to see that certain

Judgment.

1881. of the crossings are emptied of snow and certain others filled with it. As the fences were not returned until after the bill was filed, and there was very little evidence given at the hearing. I think there should be no costs up to decree, and that the costs of the rehearing should be paid by the plaintiff to the defendants.

Cameron
v.
Wellington,
Grey, and
Bruce
R. W. Co.

PROUDFOOT, V.C., retained the opinion expressed by him on the original hearing.

NORRIS V. MEADOWS.

Mortgages—Sale of lands subject to mortgage—Right to call on purchaser to pay off mortgages.

M., the owner of Blackacre and Whiteacre, subject to mortgages for \$1,600 and \$500, on both parcels in the same hand, sold Blackacre to *C.*, subject to the mortgage for \$1,600, which by the arrangement *C.* was to pay off. *M.* afterwards sold Whiteacre to *N.*, subject to the mortgage for \$500. *C.* died, and his representatives sold Blackacre to a *bonâ fide* purchaser, who covenanted to pay off the \$1,600 mortgage. Default having been made in payment, the mortgagee, in order to enforce payment, offered both the estates for sale, when *N.*, in order to protect his title to Whiteacre, purchased both estates, and thereupon instituted proceedings against *M.* and the representatives of *C.* to compel payment of the mortgage debt of \$1,600. A demurrer, for want of equity by the representatives of *C.*, was allowed, the demand, which was a personal one against them, remaining with *M.*, the original vendor.

Statement. Demurrer—The bill, which was by George Abbott Norris against Henry J. Meadows, Daniel Costello and Patrick Guiltinan, executors of the last will and testament of Michael Costello deceased, and George C. Matchett, stated that on the 24th of August, 1876, the defendant Meadows, being the owner in fee of the south half of lot 12 in the 8th concession of the Town-

1881.

Norris
v.
Meadows.

ship of Emily, containing 100 acres, and the westerly quarter of Lot 13 in the same concession, containing 50 acres, upon which he had created two mortgages in favour of the Canada Landed Credit Company for the sums of \$1,600 and \$500 respectively, sold and conveyed the last mentioned parcel, to one *Michael Costello*, for the sum of \$1,600 subject to the said \$1,600 mortgage, and the defendant *Meadows* covenanted absolutely for title, save the \$1,600 and interest due on the said mortgage; (2), that although not so expressed in the said deed of conveyance to *Michael Costello*, the amount of the said \$1,600 mortgage and interest was intended to be included in the consideration for the said sale, and the payment of the said mortgage and interest was in fact the real consideration for such conveyance, and no money payment was made by the Grantee to the Grantor, or was intended to be made and although *Costello*, did not expressly covenant by the said deed to pay the said mortgage, and to indemnify *Meadows*, against the payment of the same, yet it was the intention and agreement of *Costello* and *Meadows*, that the former should pay the same and indemnify and save *Meadows* harmless against the payment thereof; (3), that *Meadows*, on the 10th November, 1877, sold and conveyed the first mentioned parcel of land (100 acres) to the plaintiff, and although the deed of conveyance contained absolute covenants for title, yet it was understood that the sale was to be subject to the \$500 mortgage above mentioned, and the amount thereof was intended to be and actually was included in the purchase money therefor. (*) The bill further stated that *Costello*, died in 1877, and by his will devised the said lands so purchased by him to his wife, the defendant *Mary Costello*, and appointed the defendants *Daniel Costello* and *Patrick Guiltinan* his executors, and directed that the said *Mary Costello* was to have the sole control and management of his land and chattel property during the minority of his children,

Statement.

1881. and for their use and benefit; (5), that on the 22nd
December, 1877, the said *Mary Costello*, by deed sold
and conveyed the said lands so devised to her, to the
defendant *George C. Matchett*, for the sum of \$1, sub-
ject to the said \$1,600 mortgage, and the defendant
George C. Matchett executed the said conveyance and
covenanted therein that he would assume and pay off
the mortgage made by the defendant *Meadows*, to the
Canada Landed Credit Company for \$1,600. (6), that
the said mortgage was not paid by the said *Michael
Costello*, or by his widow the said *Mary Costello*, or by
the defendant *George C. Matchett*, or by the defendants
Daniel Costello and *Patrick Guiltinan* or either of
them, and a large sum having become due and in
arrear, the mortgagees the Canada Landed Credit Com-
pany, on the 22nd of May, 1880, proceeded to sell
under the powers of sale contained in the said mort-
gages, both the above-mentioned parcels of land for the
arrears, and the plaintiff, to protect his own interest in
the part of the said lands owned by him, was compelled
to purchase and did purchase both the said parcels of
land from the mortgagees at such sale for the price of
\$15.00 per acre, and the plaintiff paid the purchase
money therefor, thus satisfying both the said mortgages
and received a conveyance of the said lands from the
mortgagees; (7), and the plaintiff submitted that he
was entitled to be indemnified by the defendants
against the loss, costs, charges and expenses incurred
by him by reason of his being compelled to pay such
\$1,600 mortgage and interest, and the costs of the said
sale; and that the defendants should be ordered to re-
imburse him the amount paid by him on their behalf,
and for which they, the defendant *Meadows*, directly,
and the other defendants through the defendant
Meadows, were liable to pay, and save the plaintiff
harmless from; and the plaintiff offered to be redeemed
of the lands sold to the said *Michael Costello*, by the
defendant *Meadows*, upon payment of the amount due

Norris
v.
Meadows.

Statement.

him thereupon for principal, interest, and the costs of 1881.
the said sale and interest thereupon, and upon payment of the costs of this suit.

Norris
v.
Meadows

The prayer was, that an account might be taken of the moneys the plaintiff had expended by reason of his being compelled to pay the \$1,600 mortgage, and that the defendants might be ordered to pay the same to him, with his costs of suit.

The defendant *Daniel Costello*, demurred for want of equity.

Mr. *Boyd*, Q.C., in support of the demurrer, contended that the facts stated in the bill were not such as entitled the plaintiff to any personal relief against the demurring defendant, the only relief to which the plaintiff was entitled, being a claim against the mortgage premises; the statements of the bill shew grounds for a contest between the co-defendants, as the personal claim under the covenant is that on the part of *Meadows* upon the covenant of the late *Michael Costello*, the right to sue upon which could not be transferred to another.

Mr. *Bethune*, Q.C., contra, insisted that if the defendant *Costello*, were the person legally entitled to represent the personal estate of *Michael Costello*, the plaintiff was entitled to the relief prayed for.

Mathers v. Helliwell, (a) *Roberts v. Rees*, (b) *Parker v. Glover*, (c) were referred to by Counsel.

BLAKE, V. C.—The bill in this case states that 11th Jan.
Meadows owned one lot of 100 acres and another of 50 acres, which were subject to two mortgages, one for \$1,600, and the other for \$500; and on the 24th of August Judgment.
1876, he sold the 50 acres to *Michael Costello* for \$1,600, subject to the \$1,600 mortgage; and *Meadows* covenanted absolutely for title, except as to the \$1,600, which in fact was the consideration for the sale, and

(a) 10 Gr. 172.

(c) 24 Gr. 537.

(b) 5 U. C. L. J. 41.

1881. although there was no covenant to that effect, it was the intention and agreement that *Costello* should pay this mortgage and indemnify *Meadows* against the same. On the 10th November, 1877, *Meadows* sold the 100 acres, and conveyed the same by a deed which contained absolute covenants for title, although it was understood that the sale was subject to the \$500 mortgage, which was the consideration for the sale. *Costello* died, and his representatives sold the 50 acres to one *Matchett*, who covenanted to pay off the \$1,600 mortgage. It not having been paid the lands embraced therein were sold by the mortgagees to the plaintiff who received a conveyance therefor, and now asks payment of this \$1,600 by the representatives of *Costello*.

Judgment. If this were the case of the first purchaser seeking exoneration out of the lands covered by the mortgage, and sold subsequently to another purchaser the plaintiff might, under the authorities, I think, have asked the Court to realize on the lands sold after the date of his purchase. But *prima facie*, there is no such right as that invoked in favour of the plaintiff as against *Costello*; no casting, by the nature of the agreement, of a charge in favour of the plaintiff on the other lands as against *Costello*. This right not arising out of the transaction itself, and otherwise there being no privity between the plaintiff and *Costello*, the case of the plaintiff fails against *Costello*, and the demurrer must be allowed. The bill presents this as a personal demand against *Costello's* representatives, and not as an equity against the land. The personal claim remains with *Meadows*.

NEILL V. CARROLL.

1881.

Mechanics' Lien Act—Computation of time.

Upon rehearing the decree pronounced by SPRAGGE, C., reported *ante* page 30, was affirmed with costs.

This was a rehearing at the instance of the plaintiffs of the decree made herein, as reported *ante* page 30 where the facts sufficiently appear.

Mr. G. H. Watson for the plaintiffs. The plaintiffs' claim depends upon whether the lien was registered and their bill filed within the time required by the statute. The evidence distinctly shews that when the engine was erected and after it was started it was found to be defective and required the addition of several new brasses. The plaintiff John Neill in his evidence stated that immediately after it was discovered by Carroll that these brasses were needed for the engine notwithstanding the fact that the engine continued to run Carroll had declared that he would not accept the engine as it was; and that in accordance with Carroll's request these brasses were made, and a man was sent to Carroll's mill for the purpose of placing the brasses on the engine. It was acknowledged by Carroll that he would not then allow this to be done as he did not wish to stop the engine. The brasses were afterwards put in, and the contract could not properly have been considered as complete until then. It did not matter how small the addition or change was, as, taken with the fact that Carroll declined to accept the engine until this was done proves that Carroll himself did not regard the contract as completed without the placing of these brasses. This was done on the twenty-seventh of December, and the contract was not complete till then. Where a party furnishes materials at different times but in pursuance of one contract he

Argument.

1881. is in time if he commences proceedings to establish his lien within thirty days from the date of the last act done in execution of the contract, and the fact that some portion of the material was used in the manufacture makes no difference; *Fowler v. Bailey* (a). The important question is whether the subsequent work done was so done in pursuance of the original agreement and was the finishing work of the job or not, and whether it was done in due time, without unreasonable delay and by the consent of the proprietor, *Holden v. Winslow* (b).

Neill
v.
Carroll.

Argument.

The case of *Bartlett v. Regan* (c), is a clear authority on this point, and the principle decided is a reasonable one. In *Yersley v. Flanagan* (d), a contract had been made with a bricklayer to do the brick and stone work about the erection of a building. The owner after the completion of the building used it and worked machinery in it. A pavement was afterwards put in before the building and it was held that the contract was not complete until then as the work had been all done under one contract.

It is not pretended in this case that the brasses were made and put in under any other than the original contract. In *Hubbard v. Brown* (e), the contract was for the erection and placing of certain structures around a house, where the proper performance of the contract required the building of a set of steps; these steps were erected about a month after the rest of the work was done and the defendant had used and occupied the house up to that time. The Court there decided that the contract was not complete until the steps were constructed as they were so constructed in good faith and in pursuance of the original agreement. *Webb v. Van Zandt*. (f), *Hazard Powder Co. v.*

(a) 14 Wis. 136

(c) 19 Penn. 341.

(e) 8 Allen 590.

(b) 18 Penn. 160.

(d) 22 Penn. 489.

(f) 16 Abbott 42.

Byrnes (a), *Hubbell v. Schreger* (b), *Guernsey* on 1881.
mechanics' liens, *Addison* on contracts 666 *et seq.*

The case of *Dunn v. McKee* (c) is distinguishable from the present one. There the work was complete in the first place and afterwards became defective. In this case it was incomplete until the brasses were put on.

The bill of complaint was filed within the proper time, as the period of credit had not expired until the note to be given in renewal of the one given by *Carroll* on the nineteenth of October became due and that would not be until the twenty sixth of April following. The time mentioned by the statute would not begin to run until the expiry of the period of credit and that was not until April; and the lien having been duly registered the twenty first section of the act provides that proceedings shall be commenced within ninety days from expiry of the period of credit, which was clearly done in this case.

Mr. *G. R. Howard* for the defendants *Wm. Kerr* and *Alfred M. Patton*. If the plaintiffs have a lien it must be under the document registered, otherwise they would have to bring their action within thirty days: R. S. O., ch. 120, sec. 20. This section does not mention credit. When the lien is acquired depends entirely on the statute, and being a creature of the statute the American cases do not apply without it is shewn that the statute under which they were decided is the same as ours. Section four of our Act says: "A statement may be filed before or during the progress of the work, or within thirty days from the completion, or from the supplying or placing of the machinery." According to the affidavit attached to the plaintiffs' lien the plaintiffs furnished the engine and boiler on the 16th of December, 1878; and the lien was filed on the 23rd of December, 1878, but the

Argument

(a) 12 Abbott 469.

(c) 5 Sneed 657.

(b) 14 Abbott N. S. 284.

Neill
v.
Carroll.

1881. evidence shews that the engine and boiler were furnished in September, 1878, and the plaintiffs' own books shew it to have been on the 31st of October, 1878.

Neill
v.
Carroll.

The plaintiffs did not file their bill till the 31st of May, 1879, and they now endeavour to shew that extra work was done, but the mere replacing of some brasses was not extra work, it was part and parcel of the original contract: See *Phillips* on Mechanics' Lien, sec. 161. No lien can attach for subsequent changes unless they are absolutely essential to give to the building or article completeness and render it fit for the purposes for which it was executed: *Phillips*, sec. 220. The defendant *Carroll*, it is shewn, was running the engine for about a month. Now if the brasses had been absolutely essential this could not have been done.

Argument. According to the evidence and plaintiffs' own books they were too late in filing their lien. The plaintiffs claim that credit was given, and that the bill was filed in time, the bill was filed on the lien as registered; but if the lien was too late the bill can be in no better position. The plaintiffs cannot vary the terms of the registered lien; the bill is not filed for the purpose of amending the lien, but for enforcing it. The contract for the engine and boiler was a distinct and separate contract, and stands alone. If extra work was done the plaintiffs are only entitled to a lien as to the extras, but they have not asked for that by their bill. The plaintiffs having accepted a note or notes, and having trusted to the personal credit of *Carroll*, they cannot now proceed under the Act: *Scadding v. Balkam* (a). If the \$800 note was given for the engine and boiler, then the plaintiffs are too late as the note was not kept renewed; for an agreement to renew without more is an agreement to renew once only: *Byles* on Bills, 12th ed. pp. 101, 102

258; *Jones v. Munro* (b), *Bishop v. Nobe* (c), *Maitland v. Page* (d); *Addison* on contracts, p. 249. If the note was not given for the engine and boiler but for other things as well, then the plaintiff's must fail: *Phillips*, sec. 156.

1881.
Neill
v.
Carroll.

The judgment of the Court was delivered by

BLAKE, V. C.—By section 4, of the Mechanics' Lien Act, "A statement of claim may be filed within thirty days from the supplying or placing of the machinery." The machinery here was supplied, and was running in the month of September, 1878. The contract price was \$1,100, the work done was imperfect as to some trifling matters admitted by the plaintiffs, and in fulfilment of the contract the defective brasses were removed and perfect brasses to the value of between \$30 and \$40 were supplied. Section four refers back to section three, which so far as this case is concerned reads as follows: "Every machinist erecting, furnishing, or placing machinery of any kind in, upon, or in connection with any building, shall by virtue of being so employed or furnishing, have a lien or charge for the price of such work, machinery, or materials," &c. In section four, when giving the period from which the time within which the registration is to be made is to be calculated, it is, as to work done to be "within thirty days from the completion thereof." I think we must read as follows the close of the paragraph, "the supplying of the machinery, or the placing of the machinery according to the terms of the particular contract under which the claim is being made."

Thirty days from the complete execution of the work under the contract is given as the time within which the registration must at furthest take place in

(a) 40 Maine R. 291.
(c) 3 M. & S. 362,

(b) 1 Ex. 473.
(d) L. R. 5 Ex. 312.

1881. *Neill v. Carroll.* one class of cases referred to, and as to the other, at furthest, within thirty days of the complete fulfilment of the contract. It was not argued that what was done was a mere illusory dealing so as to prevent the lapse of the period for registry, but *Carroll* demanded something more before he would consider the contract completed, and the plaintiff, unable to contend against this, as soon as it could be conveniently done, removed that which prevented the work from satisfying the contract, and supplied what answered that which the contract called for.

It seems to my mind reasonably clear that, although *Carroll* gave the note, he did so without accepting the machinery as fulfilment of the contract. The defect would have been then remedied, but for the convenience of *Carroll*; and when this was done it was not as a matter of repair, not from something that happened after the supplying of the machinery, but because of the objection raised by *Carroll*, the removal of which appears all along to have been insisted upon on the one hand and acquiesced in on the other. The plaintiffs did not choose to register until the work was completed; by the act of *Carroll* this was delayed. It is obviously unfair to charge against the plaintiffs the result that it is said should now flow from this cause. I take it, that under the contract the defendant contended the work agreed to be done was not completed in September; that the plaintiffs acquiesced in this; that they finished the work and completed the contract in December; that this was no colourable act to extend the time in their favour, but owing to a demand made by the defendant which they felt bound to answer, and did so *bonâ fide*; and that therefore the plaintiffs had a month from this time within which to register their claim. The rule laid down in the cases cited by Mr. *Watson* seems very reasonable, and commends itself to my judgment: *Hubbard v.*

Brown (a), Fowler v. Bailey (b), Helden v. Winslow (c), Bartlett v. Kingon (d), Yearsley v. Flanigen (e).

1881.

Neill
v.
Carroll.

It is true that the defendant gave a promissory note for \$800 previous to December. At that time Carroll had only paid \$300 in cash in place of the \$400 that the contract called for. It appears he was unable to pay the additional \$100, and in place gave his note for the whole balance due, but at the same time stipulating that the work, to complete the contract, should be done. The Legislature having given this right of lien to contractors on the faith of which work and materials to a large amount are furnished, I do not think we should hold lightly that the charge on which the contractor is depending for his security is taken from him. By the agreement the work was to be supplied for \$1,100. "\$400 cash when engine and boiler are ready for delivery here, and balance in three months, note renewable on payment of not less than \$100." The bill was not filed until the 31st of May 1879. By the contract the work was to have been completed by the 2nd of September, 1878, and the plaintiffs were to be entitled to a note payable in three months, "renewable on payment of not less than \$100." This imported the right to one renewal: *Jones v. Munro (f)*. It gave a credit of three months, with a right of extension on certain terms which were to be complied with in a reasonable time: *Gibson v. Scott (g), Mallard v. Page (h)*.

Judgment.

Under the agreement therefore, unless by a compliance with this condition within a reasonable time, the term of credit was extended, the term would expire in the beginning of December, and these proceedings should have been taken in the beginning of March. Nothing was done in the way of renewing the note

(a) 8 Allen (Mass.) 590.

(c) 18 Penn. 160.

(e) 22 Penn. 489.

(g) 2 Stark. 286.

(b) 14 Wis. (Sup Ct) 136.

(d) 19 Penn. 341.

(f) 1 Ex. 473.

(h) L. R. 5 Ex. 312.

1881. given, and whether we look at the date pointed at in the agreement or the date at which the note was actually given, a longer period than ninety days elapsed between the expiry of the period of credit and the filing of the bill in this suit.

Niell
v.
Carroll.

I think on this ground the decree made dismissing the bill should be affirmed, with costs.

MERRITT V. NILES.

Fraudulent conveyance—Statute of Elizabeth.

On a bill by a creditor impeaching a sale by *N.* to his sister, made in consideration of her assuming two mortgages on the land, certain executions against him which she paid, and a debt due to herself, it appeared that she was aware of the plaintiff's claim; that her brother had no other property to meet it; that he was of improvident habits; that a sheriff's sale was pending; that *N.* had previously refused a larger sum for the land than his sister gave; that *N.* continued after the sale to reside on the land; that she shortly afterwards sold the estate for more than twice what she gave for it, and that she bought other lands with part of the proceeds, upon which lands *N.* went and resided:

Held, that sufficient was shewn to warrant a decree declaring the conveyance by *N.* to his sister fraudulent as against creditors under the Statute of Elizabeth.

Statement. Examination of witnesses and hearing at the sittings at London.

Mr. *Boyd*, Q. C., and Mr. *J. H. McDonald* for the plaintiff.

Mr. *Meredith*, Q. C., for the defendant *Hyman*, admitted service of notice of hearing on *Niles*, who did not appear.

Merchants' Bank v. Clark, (a), *Crawford v. Meldrum* (b), *Carradice v. Currie* (c), were referred to and commented on by counsel.

(a) 18 Gr. 594.

(b) 3 E. & A. R. 101.

(c) 19 Gr. 108.

The facts are stated in the judgment.

1881.

Merritt
v.
Niles.

Feb. 2nd.

SPRAGGE, C.—The transaction impeached in this case is a sale by the defendant, *Willet Stephen Niles* to his sister *Anna Maria Hyman*, on the 1st of March, 1877, of a farm, in North Dorchester, for the expressed consideration of \$4,500. This sum was made up of two mortgages upon the land, one for \$2,000, the other for \$120, which the purchaser agreed to assume; of certain executions in the hands of the sheriff, which she agreed to pay, and of a debt due to her by her brother, which she agreed to release. She says the calculation was made hastily, in her own mind, and was somewhat less than the proper amount.

The brother was known to the sister to be a man of very improvident habits. She was herself a woman of very considerable means, and her husband, since deceased, was wealthy. She had frequently assisted her brother out of her own means; in fact he and his family were to a large extent pensioners upon her bounty. They had been so before, and they were so after the making of the conveyance impeached in this suit. Judgment.

It was known to the sister Mrs. *Hyman* that her brother had no property, other than that conveyed to her, out of which any debts that he might owe could be satisfied; and from that, and his known improvidence, that the claims of any creditors he might have would be defeated. She knew of the debt to the plaintiff, and she admits in her answer that it was a debt incurred by the plaintiff becoming surety on accommodation paper for her brother. She says indeed that her brother had told her, some considerable time before, that he had notes in his hands sufficient to discharge the debt, but she does not say that he ever told her that he had discharged it, or that she believed that he had. My inference is, that she had good reason to believe, and probably did believe, that, as the fact was, the debt

1881. *Merritt v. Niles.* was still subsisting. There was also a debt for which he was liable jointly with his brother *Henry* on account of the suretyship of their father for one *Pearson*, who had failed in business. There was some question as to whether *Henry* was not secured on property of *Pearson*; but there was, at any rate, a claim by *Henry* against his brother, that he was indebted to him on that account to a considerable amount.

From the evidence, I take it that the object of Mrs. *Hyman* was not directly to defraud creditors, but to serve her brother and his family and to secure her own debt, for which she had recovered judgment in the previous January, for \$749: but both she and her brother knew well that the effect of taking the conveyance would necessarily be to defeat any creditors of his that there might be; and that he knew, and she, if she did not know, had reason to believe that there was, at any rate one creditor, the plaintiff.

Judgment. The transaction, however, I assume, would not have been impeachable if she had given adequate consideration for the land. Several witnesses have been examined as to its value. They differ somewhat in their estimate. The average would be somewhere about \$65 an acre, which would give \$7,735. \$60 an acre would give \$7,140. \$2,640 more than the expressed consideration. We have indeed something more definite than opinion evidence to go upon. In the same spring Mrs. *Hyman* sold the property in two parcels and at two times, not far apart, to a Mr. *James*. In the sale was included twenty acres belonging to another brother, and the price for the whole was \$10,339. For the twenty acres \$1,260 was, she says, allowed to the brother, leaving \$9,079 as her share of purchase money. Some of the witnesses think that *James* paid a high price for the land—one thinks to the extent of \$1,000. This would leave the real selling value \$8,079. Dr. *Moore*, on whose opinion as to value the defendants themselves rely, thinks that *James* paid \$2,000 too much. Even

at that the selling value is placed at \$7,079, i. e. \$2,579 more than the expressed consideration. Looking at these figures, it cannot be said that anything like an adequate consideration was paid by Mrs. Hyman for the land.

1881.

Merritt
v.
Niles.

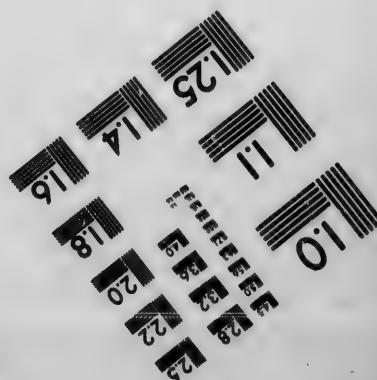
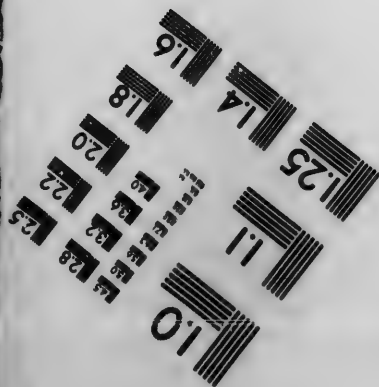
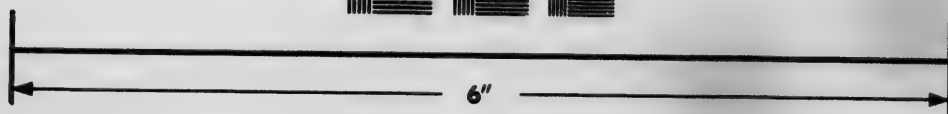
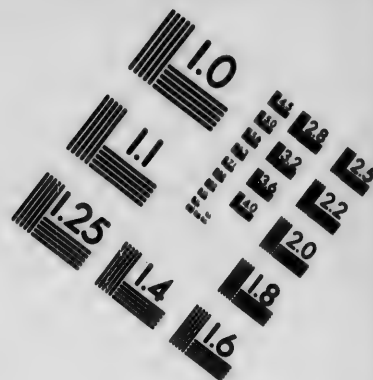
There were, moreover, some strange circumstances about the purchase. Willet Niles, the brother, had the land by devise from his father. Mrs. Hyman told him, as I assume, she thought that under the will he had not power to sell the land; and he appears to have accepted this as correct, for he says he thought he was selling only his life-interest; but adds that he would have sold at any rate, which is quite intelligible under the circumstances. The land was advertised for sale by the sheriff, and Mrs. Hyman meeting her brother on the side-walk of the street, proposed to make the purchase, and he at once assented, and the transaction was carried out shortly afterwards; Mrs. Hyman, however, having first by telegram summoned her legal adviser from Hamilton, and been advised by him that her brother had power to sell under the will. It does not appear, I think, that this was communicated to the brother.

Judgment.

Mrs. Hyman says she gave as much as she thought any one else would give. I can hardly credit this, when she asked and obtained double the price very shortly afterwards. Besides she intercepted a sheriff's sale, where it may be that a much higher price would have been obtained. The brother's object was plain enough, for when asked some time before if \$5,500 would be accepted for the farm he declined to accept it.

The real character of the transaction is obvious. It was a benefit to the brother, as it placed his land beyond the reach of creditors, and it was better, in the interest of himself and his family, that it should be in the hands of a wealthy and generous sister than be sold to satisfy creditors; and the fact of her getting it at a very low price would also give him a claim upon her





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1881. liberality. It would also be a benefit to Mrs. *Hyman* ; she would get her own debt paid, and, obtaining the land at a great undervalue, her liberality to her brother and his family might be taken, to some extent at least, to come out of the difference between the consideration paid and the real value. It was a family arrangement, and it was a benefit to all the members of the family engaged in it ; but to the creditors it was the reverse of a benefit.

Merritt
v.
Niles

Something was attempted to be made of the circumstance that there was a difficulty about title, and that an agreement for sale before the sale to *James* went off on account of it ; and that on the sale to *Janes* absolute covenants for title were given, and that proceedings for quieting the title were then pending. But, as I understand this difficulty about title arose after the transaction which is impeached, and could not therefore have been taken into account in agreeing upon the price, which, as I have said, was determined upon considerations foreign to the value of the land ; and besides, it appeared to be a formal and not a very serious defect.

Judgment.

With part of the moneys realized by the sale to *James* Mrs. *Hyman* has purchased from one *Holt* other lands in the same township. *Willet Niles* and his family continued, after the sale to his sister, to live on the land sold to her ; and after the purchase by her of the land purchased from *Holt*, her brother and his family removed to and lived thereupon. It is not contended that if the sale impeached by this bill is void under the Statute of Elizabeth, the right of creditors cannot be followed into the land purchased from *Holt*.

I have not proceeded upon the ground of secret trust ; there is some evidence looking in that direction, but I incline to think not sufficient to support the case upon that ground ; but I have proceeded upon the ground that adequacy of consideration was no element of the transaction between the parties ; and that the inadequacy was in fact so great as to bring the case

within the rule established by the numerous cases upon that head, in which conveyances have been avoided under the Statute of Elizabeth.

1881.

Merritt
v.
Niles.

The cases upon this branch of the law have been so often referred to in this Court that I do not feel it to be necessary to repeat a reference to them in this case. The language of Mr. Justice *Cresswell*, in *Halle v. Allnutt* (a), is, however, so apposite that I will quote it: "If a man having many creditors assign to one of them property exceeding in value the amount of the debt: to the extent of the excess he thereby defeats and delays the others." I agree, also, with what was said by the late Vice-Chancellor *Mowat*, in *Crawford v. Meldrum* (b), "A voluntary deed is clearly void as against creditors however meritorious a consideration it may have; and it is obviously as great a fraud on creditors for an insolvent to put his property out of the reach of creditors, by transferring it to a friend at an under-value, as by transferring it to him without receiving for it any valuable consideration."

Judgment.

There will be the usual decree, under the Statute of Elizabeth, and it will be with costs.

Mr. *Meredith* asked, on behalf of Mrs. *Hyman*, that in the event of my decree being in favour of the plaintiff, Mrs. *Hyman* should be at liberty, in the Master's order, to impeach the judgment recovered by *William Henry Niles* against *Willet S. Niles*. I incline to think that she may do this as a matter of right; and from what has appeared in this case incidentally in relation to that judgment, I judge that an inquiry into it would be reasonable. I cannot however make any order in regard to it in the absence of the judgment creditor.

(a) 18 C. B. 505.

(b) 3 E. & A. 115.

1881.

MCLAREN ET AL. V. FISKEN ET AL.

43 Vict. ch. 58 sec. 3 (D.) *Forthwith*, meaning of, in Statute—Meeting of provisional directors—Injunction.

The word "forthwith" in section 3 of the 43rd Victoria ch. 58 (D) means after the meeting of the provisional directors, and not forthwith after the passing of the Act.

Five of the nine provisional directors of a Railway Company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in alleged pursuance of such adjournment, without advertisement or notice under the statute :

Held, that the meeting of the six directors did not constitute a duly organized meeting of directors ; though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournment, it might have cured the irregularity.

This was a motion to restrain the provisional directors of the Souris and Rocky Mountain Railway Company, incorporated under the 43 Victoria ch. 58 (D.), from proceeding in an election of directors under the circumstances stated in the judgment.

Mr. Bethune, Q.C., and Mr. Hoyles for the plaintiff.

Mr. J. K. Kerr, Q.C., and Mr. W. Cassels contra.

The Hamilton and Port Dover Railway Co. v. The Gore Bank (a), Re Phosphate of Lime Co. and Austin (b), D'Arcy v. Tamar Railway Co. (c), were referred to.

18th Feb.

SPRAGGE, C.—At the close of the argument yesterday the case was, so far as this application for injunction is concerned, narrowed down to the question whether the defendants, other than the railway company, were

(a) 20 Gr. 190.

(b) 24 L. T. 932.

(c) L. R. 2 Ex. Div. 158.

in a position to proceed to the election of directors on the 30th of October. 1881.

The Act of Incorporation, 43 Vict. ch. 58, provides the mode of organizing the company. Sec. 3 names nine provisional directors, of whom five shall be a quorum, and provides that they shall hold office as such until the first election of directors; then follows a provision as to the subscriptions of stock, that the provisional directors "shall have power forthwith to open stock-books and procure subscriptions of stock for the undertaking, giving at least four weeks previous notice by advertisement in the *Canada Gazette* of the time and place of their meeting to receive such subscription of stock."

McLaren
et al.
v.
Flaken et al.

The first question is, whether the word "forthwith" means forthwith after the passing of the Act, or forthwith after the meeting of the provisional directors to receive subscriptions of stock. I think the latter the proper interpretation. I think the language used imports this, "giving at least four weeks previous notice of their meeting to receive such subscription of stock." The section seems to contemplate this as the first thing to be done, and there is no provision for the bringing together of the provisional directors except in the one mode, and it is then for that purpose. There would be certain things for them to do as to the mode, time, and place of opening stock-books and procuring subscriptions, as to which they would all have a voice, and it was contemplated that all should attend, or at least be notified to attend. In no other mode than by meeting together could they do these acts, and no other mode of bringing them together is prescribed by the Act. Judgment.

It is next contended that this provision is directory only; and a passage is quoted from Mr. *Brice's* book, (p. 642), on *Ultra Vires*, as follows: "Perhaps as one general rule it may be stated that all formalities are such, (*i.e.*, directory) which relate merely to the internal

1881. arrangements, and organization of the company." Mr. *Brice* probably means internal organization as well as internal arrangements. In that sense I agree with him; but I do not agree that the very constitution of a company, whether by articles of association or by Royal Charter, or by Act of the Legislature, can be regarded as, to cite Mr. *Brice's* words, mere directory formalities.

The cases cited to me for this contention are *The Phosphate of Lime Co. and Austin (a)*, and *Mills v. Murray (b)*. Assuming that if the nine provisional directors met together as such, and proceeded to do what the statute authorizes and directs them to do, it would not be made a question whether or not the notice required by the statute had been published in the *Gazette*, the question remains whether they did so meet in fact; and that question must be answered in the negative. Four of them met in Winnipeg, and supposing that although less than a quorum, and therefore not competent to proceed to business, they were nevertheless competent to adjourn to Toronto and meet there with others and form a quorum, they did so adjourn. The Toronto provisional directors met together at the time and place appointed by the four who had met at Winnipeg, and proceeded to business. If those at Winnipeg had met them and all had proceeded to business it would, I may assume, have cured the irregularity; but they did not, they attempted to do by proxy what they could only do in person, and the Toronto directors refused to receive the proxies. Can they then treat the absent directors as if present? Their own position up to that time was that the meeting at Winnipeg was abortive, and in that they were, in strictness, correct. There had been it may be conceded a valid notice, but at the time and place appointed four provisional directors met, who

Judgment.

(a) 24 L. T. 932-3.

(b) 4 Ex. 862.

were incapable of doing anything; what they attempted to do was futile. Their adjournment to the 3rd of August was a nullity. On that 3rd of August six directors met together. What was there to warrant those six in constituting themselves a meeting of directors. No published advertisement as required by the statute; no valid adjournment from a previous valid meeting; and this meeting of the 3rd of August was of six out of the nine directors. I wholly fail to see how these six could constitute themselves a meeting of directors to proceed to business. If one of them had asked what is our warrant for being here officially as a board of directors, I do not see what answer could be given other than that they had none. It could not possibly be a warrant to them that those or some of those who had met at Winnipeg had made an ineffectual attempt to be there also. There is no getting over the fact that only six were present, and that six could not proceed to business without being regularly convened according to the statute. The conclusion is inevitable that there was on the 30th of October no regular organization of the provisional directors, and that the gentlemen who met together on that day were not competent to proceed to the election of directors of the company; they were not shareholders; they were only six gentlemen who with three others had been named provisional directors by the Act of incorporation.

Judgment.

If section 3 could be read as divisible, and so authorizing the provisional directors forthwith after the passing of the Act, to open stock books and procure subscriptions of stock, and after four weeks' notice to receive subscriptions of stock, it would not authorize the election of directors on the 30th of October; because such election of directors is to be by the shareholders, and no subscriptions of stock could be received and consequently there could be no shareholders until at or after a meeting duly convened by advertisement

1881.
McLaren
et al.
v.
Fisken et al.

1881. in the *Gazette*, or I may assume by the whole nine provisional directors being in some way brought together. Neither of these two things has been done. My conclusion therefore is, that the injunction enjoining the defendants from proceeding to the election of directors should be continued.

*Melaren
et al.
v.
Fisker et al.*

PIERCE v. CANAVAN.

*Mortgagor and mortgagee—Purchase of part of mortgaged estate—
Liability of purchasers.*

B., the owner of two parcels of land (*D.* and *E.*), mortgaged them to one *J.*, who assigned the security, after which *J.* obtained from *B.* a transfer of his equity of redemption. Shortly afterwards *J.* sold a portion of *D.* to *P.*, who sold and conveyed to the plaintiff, who a few days later obtained from *J.* a conveyance of the remainder of the lot (*D.*), the plaintiff on each occasion paying his purchase money in full and receiving a conveyance with covenants as to title; and *J.* at a subsequent date sold the remaining lot (*E.*) to one *C.*, who sold and conveyed his interest to the defendant *Canavan*. The agreement throughout was that *J.* was to discharge the mortgage.

The Court [*BLAKE V.C.*] under these circumstances *Held*, that the plaintiff was entitled to call upon the owners of lot *E.* to the extent of the value thereof to indemnify him against the claim under the mortgage, that lot being liable in their hands for the full amount of the incumbrance, in the same manner and to the same extent as it had been liable in the hands of *J.*; in this respect following the cases of *Parker v. Glover*, ante vol. xxiv. p. 537; *Clark v. Bogart*, ante vol. xxvii. p. 450; *Nicholls v. Watson*, ante vol. xxiii. p. 606; *Clarkson v. Scott*, ante vol. xxv. p. 373.

Statement.

This was a bill by *R. Vaughan Pierce* against *John Canavan* and *Henry E. Caston*, setting forth that one *William J. Beales*, who owned lots lettered *D.* and *E.* on Cartwright street, in the town of Victoria, in the county of Welland, created a mortgage thereon, securing \$500 in favor of one *S. M. Jarvis*, who subsequently, and on the 17th November, 1873, assigned this mortgage to *The Metropolitan Building Society*, who assigned

1881.

Pierce
v.
CANAVAN.

to one *R. G. Barrett*; and that on the 22nd December, 1873, *Beales* assigned and conveyed the said lots D. and E. to *Jarvis*, who, on the 26th January, 1874, conveyed a part of lot D. to one *Sylvester Pratt*; and on the 24th May, 1875, *Pratt* conveyed to the plaintiff; and that afterwards *Jarvis* conveyed to plaintiff the residue of lot D: that subsequently to the conveyances to the plaintiff *Jarvis* sold and conveyed lot E. to the defendant *Caston*, subject to the said mortgage.

The bill further stated that in March, 1873, *Barrett* gave notice to the plaintiff that unless the amount due on the mortgage was paid he would proceed to sell.

The bill further stated that on the 22nd of March, 1880, the plaintiff paid to *Barrett* the sum of \$897.32, being the amount found due for principal, interest, and costs, in a suit brought by the plaintiff to redeem.

The bill further stated that during the pendency of the suit to redeem, *Caston* conveyed to the defendant *Canavan* the lot lettered E. which was subject to the payment of the sum due on the said mortgage, and *Canavan* took such conveyance well knowing that the lot was subject to such mortgage; and the plaintiff insisted that under the circumstances he was entitled to be repaid by the defendant *Caston* the amount so paid by the plaintiff; and the prayer of the bill was for relief accordingly.

Statement.

The defendants severally answered the bill, each alleging that it was understood on the occasion of their respective purchases that lot E. should be answerable for only one half of the mortgage money; and that *Canavan*, since the commencement of this suit, had tendered sufficient to cover that amount, which was refused.

Mr. *Ewart* for the plaintiff, contended that the prior sale of lot D. by *Jarvis* to the plaintiff, had the effect of exonerating that lot from the mortgage, and had the effect of making lot E. as between plaintiff and *Jarvis*

1881. primarily answerable for the whole of the mortgage debt, and the subsequent conveyance of lot E. could not free that lot from the liability.

Pierce
v.
Canavan.

Mr. *H. Ferguson* for the defendant *Canavan*, and Mr. *F. Hodgins* for defendant *Caston*, contended that all the plaintiff was entitled to was contribution. *McLennan v. McLean* (a), *Peck v. Buck* (b), *Thompson v. Wilkes* (c), were referred to.

Feb. 4th. BLAKE, V. C.—*Beales* owned two lots, D. and E., and on the 9th of April, 1873, mortgaged the same to *S. M. Jarvis*, who on the 17th of November following assigned this mortgage to the Metropolitan Building Society. On the 22nd of December, 1873, *Beales* transferred his interest in the lot to *Jarvis*. On the 26th of January, 1874, *Jarvis* sold a portion of lot D. to *Pratt*; and on the 24th of May, 1875, *Pratt* sold the same to *Pierce*.

Judgment. On the 29th of May, 1875, *Jarvis* sold the balance of lot D. to *Pierce*, the plaintiff. Subsequently *Jarvis* conveyed lot E. to the defendant *Caston*, who conveyed to the defendant *Canavan*. The plaintiff paid his purchase money in full, and received a conveyance which contained the usual covenants against incumbrancers, and for quiet possession. By the agreement between the plaintiff and his vendors he was to become the absolute owner of the land, and the mortgage was to be discharged by the vendor *Jarvis*. When the plaintiff completed his purchase he held lot D., with the agreement for the discharge of the mortgage; and with the right to cast primarily on lot E. the burden of this mortgage. *Jarvis* could not exonerate lot E. from this liability to the detriment of the plaintiff. While he retained the lot it was subject to this charge, and when he parted with it it passed subject to that

(a) 27 Gr. 54.

(b) 6 P. R. 98.

(c) 5 Gr. 594.

1881.

Pierce
v.
Canavan.

right, which remained until lost by the act or omission of the plaintiff. I am of opinion also that, as the plaintiff had the right while this lot remained with the vendor *Jarvis* to take steps for his indemnification out of lot E. in respect of this mortgage, the mere transference of the lot to another did not deprive him of this right. He had this right or equity as against this lot, and whether it remained with the original owner or the vendee the right existed.

In the present case, from the form of the instrument, the plaintiff was not purchasing merely the equity of redemption, but the land, and the defendant *Canavan* knew the mortgage was unpaid, and took, as he says in his evidence, the lot subject to this mortgage. So that questions which are material as shewn by some of the authorities cited, do not arise here. It is also to be observed that this is not a case in which the defendant is asked personally to pay the claim of the plaintiff, but that the land passing to him with the knowledge of the unpaid mortgage, shall remain asonerated after as before this purchase.

Judgment.

In *Hartly v. O'Flaherty* (a), Lord Chancellor *Hart* says: "But although I think that all the estates are contributory in case of the plaintiff, yet as between *Thomas Burke O'Flaherty*, and the persons purchasing from him, the contributory fund must be so marshalled as to make his remaining property first applicable, and if that should be insufficient, I think the portion of the last purchaser must be applicable before that of any prior purchaser."

When this case came up on further directions (*Lloyd & Goold*, 219), Lord *Plunkett* approved of this opinion, and thus states his own: "I must consider this case exactly in the same way as if the debt which the plaintiff has paid had been a mortgage affecting the whole of the lands of the mortgagor. If afterwards

(a) *Beatty*, at p. 79.

1881. *Pierce v. Casavan.* the mortgagor sells a portion of his equity of redemption for valuable or good consideration, the entire residue undisposed of by him is applicable in the first instance to the discharge of the mortgage, and in case of the *bond fide* purchaser, and it is contrary to every principle of justice to say, that a person afterwards purchasing from that mortgagor shall be in a better situation than the mortgagor himself with respect to any of his rights."

This judgment is also of use on the other point raised. "If the defendants were here as plaintiffs, seeking redress against *John O'Flaherty* or his representatives, on account of this or any other incumbrance having been levied off their estates, the want of such a covenant might be a bar to their redress, but as between the several persons claiming title as purchasers under different deeds, the having or not having such a covenant can make no difference as to their rights or priorities, whether in respect to contribution, or to any other right or obligation connected with their estates."

In *Averall v. Wade* (a), Lord *St. Leonards* approves of this conclusion. "There is no right to throw any part of the first judgment on the settled estate, but on the contrary that estate had a right to be indemnified against it at the expense of the unsettled estate, and no subsequent judgment creditor can disturb that right after it has once attached." See also *Hamilton v. Royse* (b), *Kirkham v. Smith* (c). These cases afford ample warrant for the conclusion at which I have arrived. It is true that in *Stronge v. Hawkes* (d), Lord Justice *Turner* in referring to these cases says: "The cases in Ireland seem to have gone to a great length upon this point, some of them, I think, to a length which I should hesitate long before I should be

(a) Llo. & G. tem. Sug. 252. (b) 2 Sch. & Lef. 315.

(c) 1 Ves. Sr. 258.

(d) 4 DeG. & J. at 652.

inclined to follow, although I do not mean to say that I dissent from these cases, as further consideration might perhaps, lead me to a different conclusion."

In *Ker v. Ker (a)*, in which there are to be found remarks in disparagement of these earlier authorities, the property operated with paramount incumbrances was settled without anything to shew on the face of the instruments that there was any intention of relieving the lands from the existing liability. Lord *O'Hagan* there states what he wanted authority for: "No authority has been produced to establish that a voluntary conveyance without a covenant against incumbrances, vests anything in the grantee save the estate which the grantor had, with all its incidents."

The Lord Justice of Appeal, while not approving of the length the cases have gone, admits that "having obtained the sanction of Sir *Edward Sugden* in *Averall v. Wade*, it must be here accepted as established. At all events since *Davis v. White (b)*, the rule laid down in these Irish cases has been followed here. See also *Re Crozier*, *Parker v. Glover (c)*, *Clark v. Bogart (d)*, *Nicholls v. Watson (e)*, *Clarkson v. Scott (f)*, *Bevor v. Luck (g)*, *Re Buck (h)*, *Horsey v. Graham (i)*, *Doe Irvine v. Webster (j)*, *Thomas on Mortgages*, pp. 93 and 222; 2 Wh. & Tu. Lea. Ca. Am. Ed., pp. 241, 922; 1 Dart. 511, 2 Dart. 749, 914.

I think therefore, on the authorities as they stand, that I am bound to conclude that where by the agreement between vendor and vendee a paramount mortgage is to be paid by the grantor, the grantee satisfying the whole of the purchase money, and the grantor retains in his hands a portion of the land mortgaged,

1881.

Pierce
v.
Canavan.

Judgment

(a) Ir. R. 4 Eq. 15.

(c) 24 Gr. 537.

(e) 23 Gr. 606.

(g) L. R. 4 Eq. 537.

(i) L. R. 5 C. P. 9.

(b) 16 Gr. 312

(d) 27 Gr. 450.

(f) 25 Gr. 373.

(h) 6 Fra. Rep. 98.

(j) 2 U. C. R. 224.

1881. the mortgage is primarily cast upon such land, and that when the same is sold it passes subject to this claim, and that, as the first vendee could, as against his vendor, have the remaining land realized so as to discharge the mortgage, this right is not lost when the land passes into the hands of a vendee.

Pierce
v.
Canavan.

Judgment.

I have considered the question of the alleged agreement. I did not think at the hearing that I could come to the conclusion that it was proved. The onus is on the plaintiff. An unsigned agreement is produced, which the plaintiff produces in proof of the fact of a completed arrangement, and to which the defendants refer to shew that the alleged agreement was never completed. A reperusal of the evidence satisfies my mind that I cannot conclude that it is proved that such an agreement was actually completed. The defendants are, if they demand it, as I understand they do, entitled to a reference to ascertain the amount due on the mortgage. As a tender has been made, further directions and costs will be reserved.

THE CITY LIGHT AND HEATING COMPANY OF LONDON,
ET AL. V. DANIEL MACFIE, ET AL.

1881.

Pleading—Parties—Demurrer.

Where certain shareholders in a company joined with the company as plaintiffs as a precautionary measure merely in case it should transpire that their co-plaintiffs, the company, were not entitled or were unwilling to sue, the Court [BLAKE, V. C.,] refused to allow a demurrer for want of equity, as the objection was purely of a formal nature.

A demurrer to a bill filed by shareholders of an incorporated company on behalf of themselves and all other shareholders except the defendants, in which the company were joined as co-plaintiffs, attacking a transaction whereby all the shareholders, including some of those whom the plaintiffs assumed to represent, received shares in the transaction sought to be impeached, was allowed.

The bill in this case was filed by *The City Light and Heating Company of London*, and *John Stewart*, and *Hompesch Massingberd*, on behalf of themselves and all other Shareholders of the said Company, except the defendants, against *Daniel Macfie*, *John Walker*, *William Bowman*, *James H. Fraser*, *John B. Taylor*, *William T. Renwick*, *Isaac Hellmuth*, *Charles Robinson* and *Isabella Black*, setting forth that in July, 1864, "The City Gas Company" was incorporated under and in pursuance of the provisions of chapter 65 of the Consolidated Statutes of the then Province of Canada, entitled "An act respecting incorporated Joint Stock Companies for supplying Cities, Towns, and Villages with Gas and Water" for the purpose of supplying the City of London and the inhabitants thereof with gas, having a nominal capital of \$40,000 divided into 2,000 shares of \$20 each: that the capital of the company was from time to time increased in accordance with the provisions of the said Act by by-laws passed by the shareholders before the year 1873, until it reached the sum of \$60,000 divided into 3,000 shares of \$20 each, at which it then stood, the said shares being then all fully paid-up shares; having been paid up partly by calls

Statement.

1881. upon the shareholders and partly by moneys carried by the directors from the profits of the Company, and applied by way of bonus to the shareholders in paying up the new stock from time to time created.

*City Light &
Heating Co.
et al.
v.
Macfie et al.*

The bill further stated that on the 7th of November 1873, a meeting of the shareholders, called by the directors, was held for the purpose of passing a by-law to increase the capital stock of the Company, and a by-law for that purpose was then unanimously passed by the shareholders then present, in the following words:—"That the capital stock of the company be increased to \$120,000 of paid-up capital, being the original cost of the works, and that the president be authorized to issue scrip to the stockholders, *pro rata*, in accordance therewith;" that the defendants then agreed together, and the said other shareholders assented to such agreement, that 3,000 new shares of stock, of the nominal value of \$20 each, should be issued by the directors to themselves and the other shareholders by allotting and issuing to each shareholder, including the directors, one share of new stock for and in addition to each share of the existing stock held by him; that no money or value whatever should be given or paid by any shareholder or director for or in respect of any such share, but that all the said shares should be issued and treated to all intents and purposes as fully paid-up shares, and should be so entered in the books of the company, the object and intention of the defendants in entering into and carrying out the said agreement being to divide amongst themselves and the said other shareholders one half of the value of the property of the company without paying anything to the company therefor; and that the same was accordingly done.

Statement

The bill further stated that by an Act of the legislature of Ontario, 43 Vic. ch. 75 the said Gas Company and *The Steam City Heating Company* should forthwith be amalgamated and merged, in a company to be called *The City Light and Heating Company*.

The bill further stated that no sum of money whatever had at any time been paid to the Gas Company or to the plaintiffs *The City Light and Heating Company of London* by any of the said directors, or by any of the said shareholders, or by any person or persons whomsoever, nor had any value of any kind ever passed to the said company or to the plaintiffs the company from any of the said directors or shareholders, or from any person or persons whomsoever in respect of the 3,000 shares of new stock so issued by the said *Daniel Macfie*, and the said other directors as fully paid-up stock.

1881.

*City Light &
Heating Co.
et al.
v.
Macfie et al.*

The bill further stated that certain of the defendants threatened and intended, unless restrained from so doing, to sell and transfer the shares of such new stock to some person or persons who were unaware of the circumstances above set forth, to the prejudice of the rights of the plaintiffs in the premises, and* that the defendants were the holders of 2,835 shares of the stock of the said company, including a large number of the said new shares, and they held proxies enabling them to vote upon a sufficient number of additional shares to give them a majority of votes at any meeting of the shareholders of the company, wherefore the plaintiffs other than *The City Light and Heating Company* were joined with the said company as co-plaintiffs. The bill prayed that the defendants might be declared liable to and might be ordered to pay and make good to the company all the dividends declared and paid in respect of any of the said 3,000 shares of new stock improperly issued by them as paid-up stock, together with the interest thereon, and also to pay and make good to the company the sum of \$20 per share, which the company should have received upon the said 3,000 shares from the persons to whom they were issued, and an injunction to restrain the disposing or transferring of the said 3,000 shares; and for further and other relief. The defendants demurred for want of equity.

Statement.

* In par. 23.

1881. Mr. *Boyd*, Q. C., and Mr. *Fraser* for the demurrer.

City Light &
Heating Co.
et al.
v.
Macfie et al.

Mr. *C. Robinson*, Q. C., Mr. *R. Meredith* and Mr.
Street, contra.

1st Nov.
1880.

BLAKE, V. C.—The plaintiffs are obliged to admit that the company have the right to take the proceedings which have resulted in the filing of this demurrer. If they have the right to do so, they are bound to adopt this course, or else to explain upon the record the circumstances which compel them to adopt a course of procedure other than that which, *prima facie*, should be taken. The twenty-third paragraph of the bill is the only one which seeks to account for others being joined with the company as plaintiffs. The name of the company is now used; there is nothing to shew that the shareholders and directors were not controlled at all times by the defendants, or that the defendants object or will object to the name of the company being used in order to the fullest investigation of the matters alleged against them; there is nothing to shew a probability of the refusal of the name of the company in order to the investigation of the questions set forth in the bill in the future any more than in the past. I do not say that it was not possible so to frame clause twenty-three as that the bill might have been sustained against a demurrer, but as this paragraph stands now it does not present any reason for not allowing the company to be the sole plaintiffs. See *McMurray v. Northern R. W. Co.* (a), and *Johnston v. Montreal* (b).

Judgment.

In the present case the co-plaintiffs have not the right of suit unless they are deprived of the right to use the name of the company. That they are not deprived of this right is clear, from the frame of the record. They are not therefore on this record em-

(a) 22 Gr. 476, and 23 Gr. 134.

(b) 22 Gr. 290.

powered to sue. *Cholmondely v. Clinton (c)*, King of 1881.
Spain v. Machado (d), *Makepeace v. Haythorne (e)*.
Cuff v. Platell (f).

City Light &
 Heating Co.
 et al.
 v.
 Macfie et al.

I am, however, unable to conclude that this is more than a merely formal objection. The co-plaintiffs claim that a wrong has been done the company; and that they are suffering from this wrong. They set the matter in motion and lest, problematical though it may be, by any means the suit should be stayed if commenced in the name of the company alone, they add themselves as co-plaintiffs, so that under such circumstances the suit may still be continued. No additional or other relief is asked. Simply as a matter of precaution these names are used with that of the company. I can scarcely conceive of a more formal objection than that which is here taken, and think if the 7th clause of ch. 49, R. S. O., is ever to be applied it must be in such a case as the present. See also *Duckett v. Gover (a)*, and *Mason v. Harris (b)*. If this were the only ground of objection to the bill I think I should overrule the demurrer. There was however the further objection taken, that the plaintiffs undertake to occupy the two-fold position of representing those who desire to set aside, and those whose interest it is to uphold the transaction attacked by the bill. The bill is filed by the plaintiffs "on behalf of themselves and all other shareholders of the said company except the defendants."

Judgment.

It is alleged that each of the shareholders, which included one *Ronald C. Macfie*, (since deceased,) improperly received new scrip certificates and dividends. Then the prayer of the bill embraces the whole of the shareholders in the new stock, as by its first clause it asks, "That the defendants may be declared liable to and may be ordered to pay and make good to your com-

(a) T. & R. 107.

(c) 4 Russ. 245.

(e) 6 Ch. Div. 82.

(b) 4 Russ. 225.

(d) 4 Russ. 242.

(f) 11 Ch. Div. 97.

1881. *plainants, The City Light and Heating Company of London*, all the dividends declared and paid in respect of any of the said 3,000 shares of new stock improperly issued by them as paid up stock, together with the interest thereon, and also to pay and make good to your complainants *The City Light and Heating Company of London*, the sum of \$20 per share, which the said City Gas Company should have received upon the said 3,000 shares from the persons to whom they were issued."

*City Light &
Heating Co.
et al.
v.
Macfie et al.*

Judgment. It is sought to affect all the shares issued. The estate of *Ronald C. Macfie* represents a portion of these shares. The plaintiffs attack the transaction whereby these were obtained by him, and yet they undertake to represent him or his estate in this contest. It is clear the plaintiffs cannot occupy this position. The plaintiffs must therefore amend. I follow the wholesome rule laid down in *Duckett v. Gover* gladly, and reserve the costs, as fraud is charged in the bill.

1881.

HOOKER V. MORRISON.

Statute of Limitations—Acknowledgement of title—Interruption of possession—Mortgage.

The father of the defendant was in wrongful possession of land from 1844 to 1862, when *P.* the owner mortgaged to *A.*, who assigned to the plaintiff, and interest was regularly paid thereon by the mortgagor until two years before the institution of this suit. In 1865 the defendant wrote to *P.* concerning a purchase of some timber on the lands, and *P.*'s agent went over and measured the timber cut, which was sold to the defendant; and in 1866 *P.* sold timber on the land to strangers.

Held, (1) that such entries upon the land, which were sufficient to constitute trespass if unlawful, interrupted the running of the statute in favour of the defendant, who was tenant at will; and that the written application of the defendant to *P.* was a sufficient acknowledgment of title to prevent the running of the statute against *P.*, and (2) that the possession of the defendant before the creation of the mortgage which was insufficient at that time to bar the mortgagor, did not run against the plaintiff.

An acknowledgement of title by a person in possession of land, given to a mortgagor, is sufficient to prevent the occupant acquiring title under the statute, so as to bar the rights of the persons entitled. For this purpose it is not necessary that the mortgagor should be acting as agent of the mortgagee; the mortgagor for such purpose is a person entitled under the statute.

This was action at law to recover possession of land, and came on for trial at the sittings of the Court in Barrie, before *Spragge, C.*

Mr. McCarthy, Q.C., for the plaintiff.
Mr. Lount, Q.C., for the defendants.

The facts appear in the judgment.

SPRAGGE, C.—There seem to be only two points which it is necessary to consider.

One is founded upon the position of the plaintiff, who is the assignee of a mortgagee. *Mr. McCarthy's Judgment.* position is, taking the earlier of the two mortgages made by *Patton to Averill*, and which is dated the 1st

1881.
Hooker
v.
Morrison.

of October, 1862, that *Patton* having then a good title, conceding that there was then a possession in the defendant that would in time have ripened into a title in him against *Patton*, that the previous possession of the defendant does not, under the statute, count against the mortgagee. The first possession other than that in the holder of the paper title, was the possession of *James Morrison*, the father of the defendant. That possession is not shewn to be earlier than in 1844, and eighteen years only had elapsed when the mortgage to *Averill* was made. The mortgagor has paid interest on his mortgage up to a recent period, some two years ago; and the first question is, whether the acquiring of title by the mortgagee interrupts the running of time by possession, as the time would otherwise run on, and unless there was a break upon the death of *James Morrison*, the possession would have ripened into title in 1864, and there has been nothing since to revest the title in *Patton* or those claiming under him.

Judgment.

I am inclined to think that there was not a break in the possession upon the death of *James Morrison*. It is assumed that he died intestate. The defendant after a short interval took possession, and continued to work the place as his father had done. In the mean time the widow, and the rest of the family, who were younger than the defendant, had continued to occupy the place. The defendant, with his brothers and sisters, were tenants in common. The father having died in possession had a title which passed to his heirs, and they would be in as tenants in common. If when the defendant came to the place and worked and cultivated it, an ouster of the other tenants in common was thereby effected or not would not be material. The defendant was a tenant in common in possession, either solely or jointly with other tenants in common, and became afterwards, if he was not at the time, solely in possession.

If Mr. *McCarthy's* position is correct, there was a

1881.

Hooker
v.
Morrison.

possession which had not ripened into title in 1864, nor in 1865, when by written communications between the defendant and *Patton* the latter sold to the former timber that was upon the land, and *Patton's* agent went over the land along with the defendant himself and measured the timber that had been cut.

Mr. *McCarthy* uses what passed upon this occasion, in two ways. The written application for the purchase of timber, it being timber on the land of which he was in possession, was, he contends, an acknowledgment in writing within the statute of the title of *Patton*, *Patton* then having the equity of redemption, and it is contended that the entry on the land by *Patton's* agent, and the measurement of the timber there by him, was an interruption of the possession of the defendant. But this was more than ten years (the new period of limitation) before the commencement of this action, and a later period of a similar interruption of possession is relied on by the plaintiff. This occurred late in the autumn of 1866, as late as November. Mr. *Patton*, through his agent *Craig*, sold timber to Messrs. *McLean & Johnson*. It was not a sale of timber growing on any particular part of the lot, but of timber generally, growing on the lot, and the cutting extended through the winter of 1866-7. Judgment.

Assuming that the defendant's possession had not ripened into title, it is contended that the cutting of timber under the authority of Mr. *Patton*, was an interruption of the possession of the defendant. If it were so, there was a break in his possession, and it required a new start for the statute to begin to run; and it is contended that the position of the defendant was that of a tenancy at will: that the statute therefore did not commence to run until one year after that interruption, and consequently that the ten years did not expire till after the commencement of this action. It is not denied that the position of the defendant after this interruption was, assuming that he had not then

1881. acquired title by possession, that of a tenancy at will. Some question was raised as to the date of this cutting by *McLean* and *Johnson*, but I think it is fixed by the evidence of the defendant himself at the date that I have named.

Hooker
v.
Morrison.

It is denied that the legal effect of this cutting was to operate an interruption by *Patton* of the possession of the defendant. That question and the question of the effect of the mortgage made by *Patton* to *Averill* in 1862, remain to be considered.

To take first the question of the effect of the mortgage given in 1862. Section 12 of The Real Property Limitation Amendment Act, 1874, runs thus: "Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action at law or suit in equity to recover such land at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued."

Judgment.

There was no such provision in the original Real Property Act 4 Wm. IV. ch. 1; and the Act 16 Vict. ch 121, was passed to introduce a similar provision, the limitation then being twenty years; this was in 1853. An Act with the like provision had been passed in the Imperial Parliament in 1837, there having been no such provision in the English Real Property Act of 1833, 3 & 4 Wm. IV. ch. 27, so that the legislation in Canada upon this subject followed and conformed to the legislation in the Imperial Parliament. The Imperial Act of 1837, and our Act of 1853, were passed specially, as appears by the recitals, to clear up doubts which had arisen upon the construction of the previous Acts.

Doe Palmer v. Eyre, (a), decided in 1851, is a lead-

(a) 17 Q. B. 366.

ing case upon the construction of the Imperial Act of 1837. The owner of a house, *John Eyre*, mortgaged it, and paid interest upon the mortgage. The defendant was the sister of the owner. Her mother had been tenant for life of the house; the defendant resided there with her mother up to the time of the mother's death; and from that time, which was more than twenty years before the commencement of the action. She had been permitted by *John Eyre*, who, on the death of his mother, had become entitled to the fee, to reside there, free of rent; and she had made no written acknowledgment of her brother's title. The mortgage to the representative of the plaintiff was made less than twenty years before action brought; while the possession of the defendant was more than twenty years before action. So that the question was raised whether the Act of 1837 took the case out of the operation of the Act of 1833, in favour of the mortgagee, precisely the question which upon that branch of the case is raised here, and it was held that it did.

1881.
Hooker
v.
Morrison.

Judgment.

Lord Campbell, who delivered the judgment of the Court, after observing that under the earlier Act the fee would have vested in the defendant, for which he cited *Doe Goody v. Carter* (a), proceeded to meet the arguments of counsel against the construction that under the later Act 7 Wm. IV., 1 Vict., the possession before the mortgage did not run against the mortgagee. He says: "The defendant's counsel contend that the enactment must be confined to the case where the mortgagor has himself been and continued in possession of the mortgaged premises, or might himself maintain an ejectment against a tenant in possession; and we are told that its object was to remove a doubt whether, where the mortgagor had been allowed to remain in possession more than twenty years after the forfeiture of the mortgage by default in repaying the

(a) 9 Q. B. 863.

1881.

Hooker
v.
Merriman.

mortgage money, although the interest on the mortgage continued to be regularly paid, the mortgagee could maintain an ejectment against the mortgagor or his tenants. But we must learn the object of the Legislature from the language of the statute; and it clearly appears to have been, to make mortgages an available security, where they were good and valid in their inception, and the mortgagee, having received payment of his interest, cannot be charged with any laches. This object would be effectually defeated if we were to adopt the limited construction proposed, by interpolating the words necessary for that purpose. * * *

On the other hand it is said that, although there may be little sympathy for a person who, like the defendant, ungratefully and fraudulently seeks to turn long continued kindness into the means of robbing a benefactor, we must regard the hardship which may be thrown upon a purchaser for value, who for twenty years has been in undisputed possession of the estate.

Judgment.

But a purchaser can only be affected by mortgages executed prior to his purchase; in a register county he must have full notice of a prior mortgage, or it is void as against him; and, even without the benefit of a register, there must have been negligence on his part if an existing mortgage is not discovered. It was argued before us that the owner of an estate, who is himself barred by a tenant having occupied twenty years without payment of rent or acknowledgment, might, by executing a mortgage, and payment of interest to a mortgagee, vest in the latter a right of entry which he could not exercise himself; but by such a mortgage nothing would pass, under Stat. 3 & 4 Wm. IV., ch. 27, sec. 34, the right of the owner being extinguished at the end of the period of limitation. A case may be put, where a person who has occupied as tenant by sufferance nearly twenty years, without payment of rent or written acknowledgment, might be deprived of the benefit of the Statute of Limitations by the owner

mortgaging the premises and going on, for a great many years afterwards, paying interest to the mortgagee. But it cannot be considered to have been an object of the Legislature to protect the interest of such a person."

1881.

Hooker
v.
Merrison.

I have quoted largely from Lord Campbell's judgment, because not only the decision itself, but the grounds upon which the case was decided, apply clearly to this case.

In *Doe Baddlely v. Massey*, reported in the same vol. (a), *Doe Palmer v. Eyre*, is referred to and affirmed; and in a subsequent case in the Exchequer, *Ford v. Ager* (b), both the cases in the Queen's Bench are referred to and followed, Chief Baron Pollock observing: "Apart from authority, I think it clear that as against those who claim under the mortgagee, the plaintiff has no title." The same question upon our statute has been decided in the same way by our Court of Queen's Bench in *Boys v. Wood* (c).

In some of the cases possession was had and retained, Judgment. under circumstances which made a defence of the Statute of Limitations peculiarly dishonest; and the Judges observed upon the conduct of the defendants, but this conduct was not the *ratio decidendi*; that was as it was put by the Chief Justice of Ontario, in *Boys v. Wood*, "the right of entry of the mortgagee as against the defendant did not accrue until after the making of the mortgage, and as this was within twenty years of the bringing of the action, the plaintiff is entitled to recover." There had of course not been twenty years' possession by the defendant before the making of the mortgage.

Upon the other principal point in the case, what took place in 1865, and what took place in the autumn of 1866—what was done upon these occasions I have already referred to. I am of opinion that under the

(a) p. 373.

(b) 2 H. & C. 279.

(c) 39 U. C. R. 495.

1881. authorities they were acts of a character that amounted to interruption of the possession of the tenant; in other words, a determination of the tenancy at will.

Hooker
v.
Morrison.

In *Turner v. Doe dem. Bennett*, reported in 9 M. & W. (a), in the Exchequer Chamber, the defendant was tenant at will of a farm. Certain parish authorities, wishing to cut a drain through it, applied to him for leave; but he being unwilling that it should be done, they applied to the plaintiff, who gave permission, and it was done. In subsequent years stones were dug at a quarry on the farm by order of the owner, and trees were planted by him at different times.

In giving judgment, Lord *Denman* said: "The intent of an entry is undoubtedly, in many cases, important; but in the case of a tenancy at will, whatever be the intent of the landlord, if he do any act upon the land for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act;" and judgment was given for the lessor of the plaintiff. This case is of high authority, the Court by which it was decided being composed of Lord *Denman*, *Tindal*, C. J., *Patteson*, *Williams*, *Coleridge*, *Coltman*, and *Maule*, JJ.

Judgment.

In that case, as in this, there was an active exercise of authority by the owner of the land, though without any eviction of the tenant at will. The acts were indeed very much of the character of those which occurred in this case, and certainly what was done in this case would, but for his right, have been acts of trespass for which the doer of them would be liable at law.

Locke v. Matthews (b), establishes what was in effect established by the case in the Exchequer Chamber, that actual eviction of the tenant at will is not necessary to a determination of the tenancy. I refer also to *Allan*

(a) p. 643.

(b) 13 C. B. N. S. 754.

v. England (a), Randal v. Stevens (b), Henderson v. Harris (c), Palmer v. Thornbeck (d). 1881.

Hooker
v.
Morrison.

In all the cases that I have seen, the determination of the tenancy at will has been by the legal owner of the land. It has not been contended that the same acts done by a mortgagor would not have the same operation. I incline to think that they would, but the point not having being mooted, I express no decided opinion upon it.

The letter respecting the purchase of timber written by the defendant to *Patton* was, I apprehend, a sufficient acknowledgment in writing under the statute. The rule is well expressed in *Darby & Bosanquet's* treatise on the Statutes of Limitations. "It does not seem that any particular form of acknowledgment is necessary; but anything from which an admission of ownership in the party to whom it is given may be fairly implied, would appear sufficient." This is borne out by the cases. I refer particularly to *Incorporated Society v. Richards (e)*, *Fursdon v. Clogg (f)*, *Goode v. Job (g)*, and *Lessee of Corporation of Dublin v. Judge (h)*. Judgment.
The acknowledgment under the statute is of the title of the person entitled to any land or rent, and may be given to him or his agent. A mortgagor is, I should say, a person entitled, and in this case was dealt with as the person entitled. It is not necessary to express any opinion whether the mortgagor is for such purpose the agent of the mortgagee, if, as I think, the mortgagor is a person entitled under the statute.

The material question however upon this branch of the case is, whether what took place in the autumn of 1866 was a determination of the tenancy at will. I feel clear that if what was done by the mortgagor had

(a) 3 F. & F. 49.

(c) 30 U. C. R. 360.

(e) 1 D. & Wn. 208.

(g) 28 L. J. Q. B. 1.

(b) 2 E. & B. 641.

(d) 27 C. P. 291.

(f) 10 M. & W. 572.

(h) 11 Ir. L. R. 8.

1881. been done by the mortgagee, it would have been so, and I incline to think that done as it was by the mortgagor it was so. The verdict will be for the plaintiff, and of course with costs.

Hooker
v.
Morrison.

NICHOLSON V. SHANNON.

McPHERSON V. SHANNON.

Husband and wife—Fraudulent conveyance—Statute of Elizabeth.

S. purchased lands with moneys payable to him by the Crown for work done under a contract, which lands he had conveyed to his wife.

Held, that although the moneys could not be reached by garnishing them before being paid by the Crown, yet that the money having passed out of the Crown, by reason of the husband's appointment in favor of his wife, the effect was to defraud creditors, and the gift was therefore void under the Statute of Elizabeth.

Statement. These causes, came on together for hearing at the sittings at St. Catharines. The bills were filed impeaching a conveyance to the defendant's wife as fraudulent against creditors, under the circumstances stated in the judgment.

Mr. *McClive* and Mr. *Brennan*, for the plaintiff *Nicholson*.

Mr. *Cox*, for the plaintiff *McPherson*.

Mr. *O'Donohoe* and Mr. *McKeown*, for the defendants.

Morton v. Nihan (a), Rice v. Bryant (b), Merchants' Bank v. Clarke (c), McEdwards v. Ross (d), Boustead v. Shaw (e), Grant v. Grant (f), Roper on Husband and Wife, 126, 173, were referred to.

1881.
Nicholson
v.
Shannon.
McPherson
v.
Shannon.
Nov. 10th,
1880.

SPRAGGE, C.—At the hearing of these cases I expressed my views upon the conveyance to the wife thereby impeached, and I gave my reasons at some length for the conclusion at which I arrived, that the conveyance was in fraud of creditors.

I have since looked at the cases to which I was referred, and remain of opinion that the transaction is void under the statute of Elizabeth. I do not think that the circumstance, that the money wherewith the purchase money was paid came from the Government makes any difference. It was money due and payable by the Crown to the husband upon a contract made by certain officers of the Crown with the husband; and assuming that Mr. O'Donohoe may be right in his position that this money, while in the hands of the Crown, could not be garnished at the suit of a creditor of the husband, it did pass out of the hands of the Crown upon the appointment of the husband, and was applied by him, (if it actually reached his hands, or by his direction if it passed into other hands for him,) in the purchase of the land conveyed to his wife. At the time of its being so applied it was his money. If the purchase had been made in the name of a stranger, the circumstances were such that there would have been a resulting trust in his favour on the ground that the money was his. Being made in the name of the wife, it was a gift. It would have been presumed to be so without appointment; and it, of course, was so by the express appointment of the husband, and on the same ground, that the money was his. The answer to this

Judgment.

(a) 5 App. R. 20.

(c) 18 Gr. 594.

(e) 27 Gr. 280.

(b) 4 App. R. 542.

(d) 6 Gr. 373.

(f) 34 Beav. 623.

1881. by the defendant is, that it was the payment of a debt due by the husband to the wife. I dealt with that part of the case at the hearing, and have seen no reason to alter my opinion upon it.

The decree will be with costs.

Nicholson
v.
Shannon
McPherson
v.
Shannon.

FERGUSON V. FERGUSON.

Constructive trustee—Statute of Limitations—Costs.

The defendant, in consideration that his father would convey to him certain lands in the township of Caledon, undertook and agreed to convey to the plaintiff, a younger brother, 100 acres of land in the township of Artemesia. The father conveyed the land to the defendant, but instead of his conveying to the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age.

Held, that under these circumstances the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the Statute of Limitations; but the defendant having denied the agreement to convey, which, however, was clearly established by his own evidence, the Court [BLAKE, V.C.,] on dismissing the bill, refused to give the defendant his costs.

This was a bill by *Peter Ferguson* against *Daniel Ferguson*, seeking to compel the defendant to account for the purchase money and interest of 100 acres of land in the township of Artemesia, which it was alleged by the bill he had agreed to convey to the plaintiff as an inducement for their father giving the land occupied by him in the township of Caledon to the defendant, and which the father had done. The defendant, by his answer, denied having made any such agreement. On the hearing of the cause, however, the defendant was called as a witness for the plaintiff, and in his evidence was obliged to admit that the statement of the bill in that respect was substantially true.

Statement.

The defendant also raised the defence of the Statute of Limitations. 1881.

Ferguson
v.
Ferguson.

Mr. *R. Fleming*, for the plaintiff.

Mr. *Moss* and Mr. *Milligan*, for the defendant.

BLAKE, V. C.—There is no doubt the defendant obtained the land in Caledon on the agreement that he was to give *Peter Ferguson* 100 acres of land in Artemesia. In place of conveying this lot to *Peter* he, more than twelve years ago, sold it. I think the true conclusion from the evidence is, that *Peter*, at the time of the filing of this bill, was thirty-two or thirty-three years of age. The defendant was but constructive trustee of the land or of the money, and so the Statute ran, and has barred the claim. As the defendant denied the agreement by his answer, which has been in effect proved out of his mouth on the examination before me, the dismissal of the bill must be without costs. Had he simply relied on the Statute, I should, following the more recent authorities, have given him his costs.

Judgment.

1881.

RE LAWS—LAWS v. LAWS.

*Husband and wife—Wife's chose in action—Reduction into possession
—Evidence—Statute of Limitations.*

The widow of the intestate claimed against his estate a sum of \$700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock in trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C. cap. 73. Evidence was given in corroboration of the claimant to the effect that:—"He (*Laws*) told me he had got \$600 or \$700 from his wife. She had got a little money. He said he had paid that money for the things he had in the store. This was after he had bought *L.* out, * * He said his wife had helped him to \$600 or \$700 * * I understood he had used the money to buy out the business."

Held, affirming the order of the Chancellor, reversing the finding of the Master at Hamilton, that she could not recover.

Per SPRAGGE, C., and BLAKE, V. C.—The evidence of the widow was not sufficiently corroborated.

Per PROUDFOOT, V. C.—The evidence that the chose in action was originally hers, and that she gave it to her husband, was corroborated, and this corroboration was sufficient to support her own evidence that it was a loan; but the C. S. U. C. cap. 73, gave her the right to assert her proprietorship as against her husband, and as incident thereto the right to bring a suit against him; to which proceedings however the Statute of Limitations was a bar, and therefore her remedy was gone.

This was a rehearing of an order made on an appeal from the report of the Master at Hamilton in an administration suit allowing the claim of *Clarinda Laws* the widow of *John Laws*, the intestate, as a creditor for money lent to the intestate during his lifetime.

Clarinda Laws was married to the intestate in December, 1858, without any marriage contract or settlement. She had at the time of her marriage a sum of \$900 which she had saved from her wages, and she swore that in the month of March, 1859, she lent \$700 out of this money to her husband, upon his promise to repay the same to her with interest, and he purchased therewith from one *Lavender* the stock-in-

trade and good will of a business which he carried on for several years afterwards. She also swore that in 1869 her husband had the money, and expressed his willingness to repay the loan; but he requested his wife to allow him to retain and use it in the purchase of real estate for the purposes of his business and upon his then renewed promise to repay the same with interest, she consented to his using the money for that purpose, which he did. Her husband died in 1878 intestate and childless, and without having repaid the loan from his wife or any interest thereon. His personal estate was insufficient to pay his debts, and his only real estate consisted of the lot he had purchased with his wife's money. Mrs. *Laws*, his widow, filed her claim in the Master's Office for repayment of the \$700 and interest, out of deceased's estate. She supported her claim by her own evidence and the evidence of one *Beers*, who said he had known *John Laws* intimately for 20 years and proceeded: "I have heard him talking about having bought out *Lavender*. He asked me how business was. I answered, it was dull. He said, I had no occasion to grumble for I had paid nothing for mine. He told me he had got \$600 or \$700 from his wife; she had a little money; he said he had paid that money for the things he had in the store. This was after he had bought *Lavender* out." And on cross-examination the same witness added, "He [*Laws*] said his wife had helped him to \$600 or \$700, I do not remember whether he said \$600 or \$700. I understood him he had used the money to buy out the business."

1881.

Re Laws.

Statement.

Upon this evidence the Master delivered a written judgment of which the following are the most important portions:—

"The claim is objected to on the part of the defendants on the following grounds, namely:

1. That the debt has not been sufficiently proved, and at all events that there was not sufficient *corrobo-*

1881. *rative* evidence of it in addition to that of the plaintiff to satisfy the statute.

Re Laws.

2. That the money was reduced into possession by the husband in his lifetime, by borrowing it from his wife.

3. That the claim is barred by the Statute of Limitations.

1. Was the debt or loan sufficiently proved? The plaintiff, who appears to be a very respectable woman, but apparently illiterate, and who in my judgment gave her evidence in a candid and straight-forward manner, states, in substance, as follows: In March, 1859, her husband, the intestate, was desirous of buying out the business of one *Lavender*, who kept a flour and feed store in Hamilton but he had not the money to do so; and to enable him to make the purchase she lent him \$700, which he was to repay with interest. There was no specified time fixed for the repayment, &c., but as the intestate had to *borrow* the money, and seems therefore to have had no means of repaying it except from his business, we may assume that the parties must have expected the loan to continue a considerable time after it was made.

Statement.

The plaintiff further testifies that at a subsequent period her husband wanted to buy some land on King street. That was about ten or eleven years ago. At that time he gave her her choice between being repaid the loan, which he said he was prepared to pay off, or to let him have the money for a longer period, so that he could purchase the land. He had not enough money to buy the land and pay her too. The result was, that he was allowed to keep the money for a longer period (which was not specified), and he then bought the land. Upon this land the intestate subsequently built two brick stores, which, with a small amount of personal estate, constitutes (after payment of some debts) the whole property left by him and now being administered.

The plaintiff further swears that the intestate, from

1881.

Re Laws.

time to time, and up to a short period before his death, when a domestic difficulty arose between them, recognised the debt, and promised to pay it, with interest: that when that difficulty arose he declared his willingness to pay her, and also to settle \$2,000 on her besides; but he had not the money to do so. The plaintiff who was getting up in years when she was married, explains how she became possessed of the money. She says she had \$900 when she was married, which she had saved from her wages as a hired servant, and keeping a toll gate, &c., &c.

On the whole her evidence proved the loaning of the money and the existence of the debt in a manner quite satisfactory and convincing to my mind.

Then comes the question. Has the plaintiff's evidence of the debt "*been corroborated by some other material evidence?*"

The witness *Beers* appeared to be a respectable and intelligent man, and gave his evidence in a satisfactory and credible manner, and in my opinion his evidence afforded all the confirmation of the plaintiff's evidence that the statute requires. The statute says in a suit &c. by or against the heirs &c. of a deceased person, an interested party to the suit shall not obtain a verdict &c. on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by *some other material evidence*.

Statement.

What is meant by this provision of the statute? Does it mean that *all* the facts or circumstances *necessary* to make out the plaintiff's claim, must be proved or corroborated by other evidence than hers (which would be equivalent to excluding the plaintiff's evidence altogether in such cases), or does it mean (as it reads) that the plaintiff shall not recover on her own evidence unless such evidence is corroborated by *some other material evidence?*

2. Was the borrowing of the money by the husband in

1881. *March, 1859, a reducing of the wife's personal property into his possession?* No doubt in March, 1859, he had the legal right to seize and take all his wife's personal property into his possession and ownership. But it is equally clear that he could in his discretion forego or disclaim, or refuse to exercise that right if he pleased. The law entitled him to take the money, but it also entitled him if he pleased, to refuse to take, have, or possess it as his property, or to give up his right to it to his wife; or make her a present of it, as many men would prefer to do in such a case. *Reducing* the property of a man's wife into possession, is a matter of *intention*. He cannot be compelled to do so against his will. It seems perfectly clear to me that the intestate by *borrowing* the money, and promising to pay it from time to time, and treating it as a debt to the time of his death, thereby disclaimed as clearly and effectually as a man could do all title and ownership to it, and shewed a determination on his part that it should continue throughout to belong to his wife; and it is not open to his heirs-at-law after his death to make him the owner of it *ab initio* against his will.

Statement.

On the whole I feel bound to hold that the plaintiff's claim is proved and must be allowed.

From this ruling of the Master, the heirs-at-law, who were the brother and sister of the intestate, resident in England, appealed.

Mr. Laidlaw, for the appeal, cited *Vansittart v. Vansittart* (a), *Gardner v. Gardner* (b), *Woodward v. Woodward* (c), *Orr v. Orr* (d), *Stoddart v. Stoddart* (e), and the Statute of Limitations, 21 Jac. I. c. 16.

(a) 27 L. J. Ch. 222.

(b) 1 Giff. 126.

(c) 9 Jur. N. S. 882.

(d) 21 Gr. 397.

(e) 39 U. C. R. 203.

Mr. F. B. Robertson, contra, cited *McEdwards v. Ross* (a), *Ferris v. Hamilton* (b), *Richards v. Richards* (c), *Nicholson v. Drury* (d), R. S. O. chap. 125 sec. 2. 2 Sp. Eq. Jur. 478. Re *Miller* (e), *Bessels v. Stern* (f), Statute 21 Jac. I. C. 16. Sec. 7. 1881.
Re Laws.

SPRAGGE, C.—This was an appeal from the ruling of the Master at Hamilton allowing to the widow of Laws the intestate \$700, as money lent to her husband after marriage, before the Married Woman's Act of 1859 came into operation.

The money in question was, before the marriage, the money of the wife, and was deposited in a bank in her name at the time of the marriage. It was then a chose in action of the wife, and liable to become the husband's property upon his reducing it into possession.

We find it afterwards in the possession of the wife. We find it transferred by her to her husband.

Could it be a chose in action not reduced into possession when in her possession?

Judgment.

But even assuming that the money was in the bank in her name, and assuming that it did not vest in her husband when the wife herself reduced it into possession by taking it out of the bank, it passed to the husband as his own property when it came into his own hands. Whether by gift or loan or admission by wife of marital right it was a reduction into possession when it reached his hands.

When in his possession he had absolute dominion, which was not the case in *Nicholson v. Drury* (g).

Now the plaintiff's case is that she made a contract of loan. A wife may make a contract with her husband in respect of her separate estate, and also when in regard to him she is in the position of a *feme sole*.

(a) 6 Gr. 373.

(c) 2 B & Ad. 447.

(e) 1 App. Rep. 393.

(g) L. R. 7 Chy. Div., at p. 55.

(b) 9 Gr. 362.

(d) L. R. 7 Ch. D. 48.

(f) L. R. 2 C. P. D. 265.

1881. *In Vansittart v. Vansittart* (a), the wife was suing for a divorce when the contract was made, and in *Richards v. Richards* (b), the money lent was the money of an estate which belonged to the wife as administratrix, circumstances which distinguish these cases from the one *sub judice*. The general rule is, that a wife cannot contract with her husband.

Re Laws.

Is not the wife in this case within the general rule?

I think I must take it that the money was in her hands simply before it was given to her husband. I should not infer that it was allowed to remain in the bank until the agreement for the loan had been made, and that she took it out upon the promise of the husband that he would take it as a loan. I should rather infer that if the fact were so she would have stated it. If the money was in her hands simply, then there is the difficulty that she could not contract. If in her hands it was his money, and in borrowing it the husband would be borrowing his own.

Judgment. Supposing these difficulties surmounted, is the evidence of the plaintiff sufficiently corroborated?

In *Bessela v. Stern* (c), it is clear that if before the Judges as a question of fact they would have held the evidence not sufficient. In that case some thought the man's silence an assent to the truth of the woman's assertion—and the woman's assertion was an assertion of the material fact in issue.

In this case the only material fact is, whether the money passed into the hands of the husband by way of loan.

It is a fact to establish a contract, and contract or no contract is the question.

Does the language of the husband deposed to by the witnesses tend to prove a loan?

The evidence of *McKillop* is that the husband said

(a) 27 L. J. Chy. 222.

(b) 2 B. & Ad. 447.

(c) L. R. 2 C. P. Div. 265.

his wife had money and it had been put into his (Laws's) business. This is not sufficient to prove the plaintiff's case within *Gardner v. Gardner*, even if the money had been separate estate. 1881.
Re Laws.

The evidence of *Francis Beers* is, that the husband said he had got \$600 or \$700 from his wife—that she had a little money—and on another occasion that she had helped him to so much money.

On neither occasion did the husband speak of the transaction as a loan or of the money as money to be returned.

In this respect this case differs from the case of *Woodward v. Woodward* (e), where the Solicitor said he had borrowed the money—and the Court lay stress upon this.

The only real question in this case is, whether there was a contract of loan.

Short of that question the money was certainly the husband's.

Upon the only real question there is no corroborative evidence. Judgment.

To compare this with *Bessela v. Stern* would be as if in that case the corroborative evidence were of the fact of seduction not of the promise of marriage.

I think the finding of the Master is wrong.

The plaintiff thereupon reheard the order so pronounced by the Chancellor.

Mr. F. B. Robertson, for the plaintiff. The money is admitted to have been in a bank at the time of the marriage, and to have remained there till the wife paid or lent it to her husband. Being there it was a chose in action of the wife,—a debt due by the bank to the wife—and did not vest in the husband unless he reduced it into possession. And the mere fact of its coming

1881. into his hands is not necessarily a reduction into possession. All depends upon the character in which, or
} Re Laws. the intention with which he took it. If he took it in his character of husband with the intention of asserting his marital right to take the money as his own to the exclusion of the wife, then he reduced it into possession ; but if he took it in a different character, and with the intention of holding it as still the wife's money and not his, there was nothing to prevent his doing so, and there was no reduction into possession.

The intention to reduce into possession will not be presumed, and here there is direct evidence of the contrary intention. In this case the husband took as borrower not as husband, and with the intention of treating the money as the wife's not as his. The husband never did assert his marital right, and he was not bound to do so : *Baker v. Hall* (a), *Wall v. Tomlinson* (b), *Ryland v. Smith* (c), *Glaister v. Hewer* (d).

} Argument. It is said that the money was in the hands of the wife before it came into the hands of the husband, and when in her hands it was not a chose in action. And it is said that, there being no evidence on the point, it is to be presumed against the wife that she took the money from the bank before she agreed to lend it to the husband or he agreed to take it as a loan. But the wife was not questioned on this point and it being admitted that the money remained in the bank till the wife paid or lent it to her husband, the proper presumption is, that the money remained where it was in the bank until the wife had a reason for taking it out, and when she did take it out it was in pursuance of the agreement with her husband, and that he would take it from her as a loan. This being so, her taking it out of the bank and handing it to her husband

(a) 12 Ves. 497.

(c) 1 My. & Cr. at p. 58.

(b) 16 Ves. 413.

(d) 8 Ves. 195.

1881.

Re Laws.

was part of the one transaction by which the money, being money which was not his, and which he was not bound to take as his, came into his hands in the character of a borrower as property of the wife which he intended should not become his, except in that character. But even if the money had been in her hands not a chose in action and at Common Law vested in him by the marriage, he was at liberty to treat it as hers and make himself a trustee of it for her, and to do this it was only necessary that he should distinctly manifest his intention so to do *McEdwards v. Ross* (a), *Ferris v. Hamilton* (b).

Further, even in her hands it was "personal property of the wife not reduced into the possession of her husband" within the meaning of Sec. 2. of R. S. O. chap. 125. If it had remained in her own hands until after May 4th 1859, and she had lent it to him after that, she could have enforced repayment without doubt. *Re Miller* (c). The act applies to all personal property, not only to choses in action, and opposes the possession of the husband to the possession of the wife, so that it protects this money whether in the hands of the wife or not, unless it were reduced into the actual possession of the husband as distinguished from that of the wife before the 4th of May, 1859. And it was never reduced into his possession in that sense, because when he did take it he took it in a different character and with a different intention. If the wife is not entitled to succeed on the first promise she is entitled to succeed under *Re Miller*, on the promise of 1869. As to corroborative evidence, the evidence of *Beers* is sufficient. The Master has found upon the whole of the evidence in favour of the plaintiff, and the Court will not interfere with his finding upon the question of credibility, *Day v. Brown* (d). The Court will treat his finding as a

Argument.

(a) 6 Gr. 373.

(c) 1 App. R. 393.

(b) 9 Gr. 362.

(d) 18 Gr. 681.

1881. court of Common Law will treat the finding of a jury, and will inquire now, not whether Mrs. *Laws* was to be believed, but simply whether the technical rule of law requiring corroboration has been satisfied. And if the evidence of *Beers* was "material evidence" on the question before the Master the rule is satisfied. The fact that the wife had money and the other fact that she gave it to her husband were facts just as material to the question as the third fact, that the husband promised to pay her the money, and as to both those facts *Beers's* evidence corroborates the plaintiff. It cannot be said that the evidence of *Beers* was "immaterial." If it was immaterial the only material fact was, whether the husband had promised to pay his wife \$700, and it was of no consequence whether or not he received any consideration for that promise. The strongly expressed *dicta* of some of the Judges in *Orr v. Orr* (a), relied on by the defendant, were not necessary to the decision of the case, and if law they would require the whole of the plaintiff's case to be proved by evidence other than her own, which would defeat the object of the Statute in making her evidence admissible.

Argument.

Mr. *Laidlaw*, contra. The marriage took place in December, 1858. The loan is alleged to have been made in March, 1859: and the Act respecting the separate rights of the property of married women came into operation on the 4th of May, 1859. The learned counsel for the plaintiff has stated that Mrs. *Laws* saved the money out of her earnings before marriage, and had deposited it in a bank, but it appeared from the evidence before the Master that she had the \$900 in her possession when she was married, and the husband therefore became by the marriage entitled to this money. It never was separate estate, and the husband in fact received it as his own. His wife was not in the position of a *feme sole* respecting it. She could not make a valid contract to lend it to her husband,

and he either received it by virtue of his marital right or under a void contract: *Vansittart v. Vansittart* (a). The evidence of a contract of loan is insufficient. The law will not imply a promise to repay this money. It must be proved, and the evidence in corroboration must be on the question at issue, namely: whether the transaction was a loan of money by the wife to the husband, or the investment of her money with her consent in the purchase of a business for their mutual advancement: *Orr v. Orr* (b), *Stoddart v. Stoddart* (c). The evidence of Mrs. Laws is not convincing, and the evidence of the witnesses in corroboration of her statement disprove a lending, and rather point to a gift from her to her husband, than the creation of a debt: *Woodward v. Woodward* (d), *Re Miller* (e). The proper conclusion from the evidence is, that he received the money for investment for their mutual benefit, and not by way of loan, and that the receipt is within the principle of *Gardner v. Gardner* (f), to be expended with the approbation of his wife, for their mutual benefit and advancement, and that the widow is not entitled to claim the money out of the assets of the husband. If it were a loan in the first place, the position of the parties was changed when the money was invested in the King street property, out of which the widow is entitled to dower, and the allowance of this claim and claim for dower would take the whole estate. In any event the claim is barred by the Statute of Limitations.

1881.

Re Laws.

Argument.

Mr. F. B. Robertson in reply. In *Gardner v. Gardner* (f) there was no evidence of an intention not to give. Here there is direct evidence of that intention. The other cases do not even decide that a Court of Equity

(a) 27 L. J. ch. 224.

(c) 39 U. C. R. 203.

(e) 1 App. R. 393.

(b) 21 Grant at 408.

(d) 9 Jurist, N. S. 882.

(f) 1 Giff. 126.

1881. will not imply a promise to repay in such cases. The Judges only say that they do not decide that equity will imply such a promise, and then go on to shew that in these cases express promises had been made.

Feb. 11th. **BLAKE, V. C.**—In this case we have the advantage of perusing the judgment of the Master, which sets out clearly the grounds on which he proceeded in forming the conclusion arrived at by him. The facts of the case are there fully set out. I am of opinion that, when the claimant married, the \$700 in question did not vest absolutely in her husband by virtue of the marriage. It was not money in the house nor in her possession, nor a sum deposited in specie in the bank, but was represented by the demand which a customer usually has against a bank when he has deposited money there. In Co. Lit. 351 *C.* it is said: "The marriage is an absolute gift of all chattels personal in possession in her own right whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract or otherwise, the husband shall not have them unless he and his wife recover them." The money came into the hands of the husband subsequently, and this was a reduction into possession on his part during coverture unless it came into his hands in such a way as to prevent its becoming his own and to reserve to his wife the right to recover it from him or his estate. The question therefore for consideration is, on what terms or under what circumstances did this money find its way into the hands of the husband. The wife, the claimant in this cause, sets out in detail these facts, but the Act requires that this should be corroborated "by some other material evidence." It is true that, under the authorities, it is not necessary that the whole of the statement of the claimant should be corroborated by other evidence, but it is clear that there must be some evidence on one or more of the points material to the case independent of that of the claim-

ant, and on such material point or points corroborating the testimony given by the person supporting the demand, so that the Court may have this additional assurance in favour of the claimant, and the estate may have this protection against claims presented after the death of the alleged debtor. The evidence which, it is urged, corroborates the statement of Mrs. Laws is that of *Francis Beers* who says, "He (*Laws*) told me he had got \$600 or \$700 from his wife, she had a little money. He said he had paid that money for the things he had got in the store. This was after he had bought *Lavender* out. * * * * He said his wife had helped him to \$600 or \$700. I do not remember whether he said \$600 or \$700. I understood him he had used the money to buy out the business." The material question is the terms on which this money was received. The evidence of *Beers* throws no light upon that point. I think therefore there is no such corroboration as that intended by the statute; and that it would be quite unsafe to allow this claim against the estate upon the statement of the claimant alone. It is, to my mind, a case in which the wisdom of the enactment requiring that which is wanting here is displayed.

1881.

Re Laws.

Judgment.

The order reheard should be affirmed with costs.

I doubt that the case of *Richards v. Richards* (a) applies to this case on the question of the Statute of Limitations, as there is much in favor of the proposition that the married women's act gives the right of action, the want of which was the reason for holding in *Richards v. Richards* that the Statute of Limitations had not barred the claim. See also *Carroll v. Fitzgerald* (b).

PROUDFOOT, V. C.—I agree in thinking that the order of the Chancery must be affirmed. But, as at present advised, it seems to me that the evidence of the plaintiff was sufficiently corroborated. To maintain

(a) 2 Bar. & Ad. 447.

(b) 5 App. R. 322.

1881. her claim she had to establish three things: that the chose in action was originally hers, that she gave it to her husband, and that he made the promise which shews that he received it with another intention than that of reducing it into possession. Any one of these three would be material to her case and evidence in support of any one would be material evidence, and it does not appear that any one of them was admitted. She is corroborated as to the two first.

Re Laws.

But assuming that her evidence is corroborated, and establishes that the chose in action was not reduced into possession and still continued to be her property, I think the claim is barred by the Statute of Limitations. The transaction took place before the passing of the Act of 1859, (C. S. U. C. c. 73.) but the 2nd sec. of that Act gave the wife the right to hold and enjoy her personal property not reduced into possession free from the debts and control of her husband as fully as if she were sole and unmarried.

Judgment.

It has been decided that this did not have the effect of making her unreduced choses in action separate estate in every sense of the word, but it gave her the right to assert her proprietorship as against her husband, and as incident to that she must have had the right to bring a suit in this court against him. To any such proceeding the Statute of Limitations would be a bar, and in this case has barred it, for the subsequent acknowledgments do not seem to have been in writing or verified in such a way as to have an effect given to them. I do not think the husband can be viewed as a trustee so as to exclude their operation. He received the chose upon no trust, it was to become his own subject to repayment pursuant to his promise.

I agree that the order should be affirmed.

SPRAGGE, C., adhered to his former judgment.

Order affirmed.

1881.

BANK OF TORONTO V. IRWIN.

*Reformation of mortgage—Fraudulent conveyance—Practice—
Foreclosure.*

A mortgage, which had been executed by the defendant *I.*, reciting that it had been agreed to be given to secure notes held by the plaintiffs, and containing covenants for title, was reformed, on parol evidence, by substituting for one of the parcels inserted by mistake, which did not belong to *I.*, another lot proved to be his at the time of creating the mortgage; and being the only other lot owned by him.

Such a mortgage is not voluntary or without consideration so as to exclude reformation.

After the creation of the mortgage, *M.* purchased from *I.* the substituted lot at an absurdly inadequate price, and the sale being otherwise attended with suspicion, was set aside as fraudulent under the statute of Elizabeth.

A writ was in the hands of the sheriff at the suit of the plaintiffs against *I.*, at the time of the dismissal of a bill filed by *I.* to redeem the plaintiff, and at the time of the sale to *M.*, which dismissal had the effect of a decree of foreclosure against *I.* Held, notwithstanding, that the plaintiffs might proceed to recover their debt against *I.*, they being in a position to reconvey the mortgaged premises.

This was a suit instituted by *The Bank of Toronto*, against the defendants *Irwin* and *Morrison*, for the purpose of correcting a mortgage executed by *Irwin* to the Bank, by inserting a lot of land owned at that time by *Irwin* in the place of a lot which had been inserted by mistake, and which *Irwin* never had owned. The other facts appear in the judgment.

Mr. Maclellan, Q. C., and Mr. Kingsford, for the plaintiffs.

Mr. Moss, for the defendant *Morrison*.

Mr. Black, for defendant *Irwin*.

1881. *The Merchants' Bank v. Morrison* (a), *Goff v. Lister* (b), *Graham v. Chalmers* (c), *Nicholson v. Dillabough* (d), *Cameron v. Gunn* (e), *Acre v. Livingstone* (f), *Crofts v Fenge* (g).

Bank of
Toronto
v.
Irwin.

Feb. 2nd.

SPRAGGE, C.—I think it clearly made out by the evidence of *Irwin*, the mortgagor to the Bank, that it was by mutual mistake that the first parcel of land described in the mortgage was inserted therein, instead of another parcel, which he swears it was intended should be inserted. His evidence is also that he owned the latter parcel and did not own the other; and that is itself very cogent evidence of the intention of the parties. I think the mistake is made out satisfactorily by the evidence.

Judgment. But it is objected on behalf of the defendant *Morrison*, that parol evidence of the agreement to give this mortgage is not admissible within the Statute of Frauds. It does not appear certainly upon the face of the mortgage that there was any agreement to mortgage the land in question; but an agreement is stated in the recital to the mortgage that *Irwin* should give a mortgage upon some lands, *i.e.*, that he should execute that mortgage by way of collateral security for the payment of certain notes held by the bank, on which the mortgagor was indorser for one *S. P. Irwin*. The mortgage contains a covenant that *Irwin* had good title to the lands mortgaged. We have then two things solemnly stated by *Irwin* in writing under seal; that he had agreed to give a mortgage on certain lands, and that the lands on which he did give the mortgage were his lands. There was then fraud unless there was mistake. But it may be said that conceding that

(a) 21 Gr. 1.

(c) 7 Gr. 597.

(e) 25 U. C. R. 77.

(b) 14 Gr. 451.

(d) 21 U. C. R. 591.

(f) 26 Gr. 282.

(g) 4 Ir. Ch. 316.

there was mistake in inserting a parcel not the property of *Irwin*, the mortgagee has still to prove what parcel, the property of *Irwin*, it was agreed should be mortgaged. It must be admitted that there is here a technical difficulty. It is, however, a difficulty which the Courts have met by admitting exceptions to the Statute of Frauds where a literal adherence to the statute would work injustice.

In the language of Mr. Justice *Story* (a). "We must therefore treat the cases in which equity affords relief, and allows parol evidence to vary and reform written contracts and instruments upon the ground of accident and mistake, as properly forming, like cases of fraud exceptions to the general rule which excludes parol evidence, and as standing upon the same policy as the rule itself. If the mistake should be admitted by the other side, the Court would certainly not overturn any rule of equity by varying the deed, but it would act upon an equity *dehors* the instrument. And if it should be proved by other evidence entirely satisfactory, and equivalent to an admission, the reasons for relief would seem to be equally cogent and conclusive. It would be a great defect in the jurisdiction of the Court, if under such circumstances it were incapable of administering relief * * *

Courts of Equity will grant relief in cases of mistake in written contracts not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction."

Once get over the difficulty that it is only by parol evidence that we can get at what land it was agreed should be inserted; we find that *Irwin* had only one parcel, other than those inserted in the mortgage, and it is too clear to admit of doubt that that one parcel was the one that he agreed to mortgage, with the other parcel to which also he had title. This brings

1881.

Bank of
Toronto
v.
Irwin.

Judgment.

(a) Equ. Jur. Secs. 156 and 162.

1881.

Bank of
Toronto
v.
Irwin.

the case within the rule which I have last quoted from Mr. Justice Story. The fact of *Irwin* having title to only one other parcel is, in my mind, sufficient without his parol evidence, that it was agreed that the mortgage should be upon that parcel, it is not only fairly but necessarily to be implied from that circumstance.

Mr. Moss objects further, that this mortgage being for an antecedent debt, and no further time being thereby given for payment, the mortgage was without consideration; and it is therefore not a case for reformation. This objection is in part met by the grounds on which the Court proceeds in reforming instruments as stated by Mr. Justice Story. The reformation proceeds upon a distinct head of equity, the correction of mistake produced by accident or inadvertence. The doctrine is well explained in Mr. Spence's work on Equity Jurisprudence, p. 413, ch. 16, secs. 2, 3. It is not necessary for the party seeking such relief to shew that he was entitled in law or equity to such an instrument as that which he seeks to have reformed; but already having an instrument he shews that it was by accident drawn up differently in some respects from what was intended by both parties; and accident was, as stated by Mr. Spence, "a circumstance on which relief might be obtained under the Roman system of jurisprudence, on the ground of natural justice," and that principle was at an early date adopted by the Court of Chancery in England. This case is distinguishable on that ground from the case of *Croft v. Fenge* (a), cited by Mr. Moss. There, there had been an instrument executed in which there was a mistake, but the relief sought was to have a mortgage executed in pursuance of a promise which was held not to be founded on valuable consideration.

It is true that the Court will not, unless by consent of parties, reform a voluntary deed; but I apprehend

(a) 4 Ir. Chy. 316.

that a mortgage given to secure payment of an antecedent debt, does not fall within that category; and I do not understand Mr. *Moss* to contend that it does.

The bill by amendment makes also this case, that at the date of the purchase by *Morrison* the plaintiffs had in the hands of the sheriff a writ against the lands of the defendant *Irwin*. The defendants meet this by shewing a bill by *Irwin* and another to redeem the land comprised in the mortgage in question and in other mortgages; and that after decree and account taken that bill was dismissed at the instance of the bank for non-payment, by the plaintiffs in that suit, of the sum found due to the bank; and that it is claimed was an election by the bank to foreclose. A writ against the lands of *Irwin* was current at the date of taking the order to dismiss.

1881.

Bank of
Toronto
v.
Irwin.

The ordinary effect of an order to dismiss a bill to redeem is to foreclose the mortgagor's equity of redemption in the lands comprised in the mortgage, but it does not constitute a binding election on his part to accept those lands in satisfaction of his debt; for he may still sue for the debt, the effect of suing being only to open the foreclosure. This is the rule where the order is in a foreclosure suit. Where the order is in a bill to redeem, its operation cannot be greater.

Judgment.

The land which is the subject of this suit was no part of the subject of the redemption suit; but only the land actually comprised in the mortgage. The land in question remained in law the land of *Irwin*. Was there anything to prevent the execution of the bank operating upon it? There was nothing unless the bank was precluded by the order taken in the redemption suit. That order would have been no bar to an action afterwards commenced by the bank. I do not see that it is a bar to the bank realizing its debt by process in a suit then pending. The debt is not extinguished; and the effect of an order to

1881. dismiss a redemption bill is not necessarily more than to prevent the mortgagor from continuing to exercise a privilege which he had sought in this Court, and had failed to exercise within the time prescribed by the rules of the Court.

Bank of
Toronto
v.
Irwin.

My brother *Proudfoot* must have taken this view of the position and rights of the parties, when he made the order of the 1st of March, 1880. I do not think that order necessary to the plaintiffs' case. It was indeed made *pendente lite*, and the defendant *Morrison* was no party to it.

If this view be correct it alone is sufficient to entitle the bank to come to this Court; for the defendant *Morrison* assumed to be owner, and was cutting timber, to the detriment of the plaintiff's security.

It is not however the only ground upon which the plaintiffs are entitled to relief. *Morrison* knew, as appears by his own evidence, that *Irwin* was largely indebted to the bank, and that he had no means of payment; but he thought, as he found nothing registered against this particular parcel of land, that he might make the purchase, and he did make it at an absurdly inadequate price. I think it a case within the Statute of Elizabeth.

Judgment.

I cannot say that it is made out that *Morrison* knew that it was intended that this land should be comprised in the mortgage to the bank, and was omitted by mistake. *Irwin*, while dealing with *Morrison* for its sale, believed that it was actually comprised in the mortgage, and I think it is a proper inference from what passed between them, that *Morrison* suspected at least that it was omitted by mistake.

Then the conveyance between the parties was what is called a quit claim deed, expressed to be of the interest of *Irwin* in the land, and without covenants, itself a circumstance of suspicion if not more. It is contended that a conveyance in that form has the

effect only of passing whatever interest *Irwin* actually had; and if his interest was subject to the equity of the bank, as between the bank and *Morrison*, to have the mortgage reformed, that *Morrison* took it subject to that equity. I do not say that this contention is not correct; but I think it is not necessary to the plaintiffs' case.

1881.
Bank of
Toronto
v.
Irwin.

My conclusions then are, that as between the bank and *Irwin* a case for reformation is made out. I incline to think, that as between the bank and *Morrison* the purchase of the latter from *Irwin* is attended with so many circumstances of suspicion, that he does not stand before the Court in the position of an innocent purchaser for value.

I think the transaction is successfully impeached in evidence as a purchase void under the Statute of Judgment. Elizabeth.

I think there was nothing to prevent the bank from selling the parcel of land in question in execution.

The plaintiffs are entitled to their costs; but they should have made their whole case at once, and should only be allowed such costs as they would be entitled to if they had done so.

1881.

CHAMBERLAIN V. SOVAIS.

Judgment creditor—Mortgagor and Mortgagee—Principal and surety.

In a suit to redeem, the plaintiff was a judgment creditor with execution in the hands of the sheriff against the lands of the defendant *S.*, which lands were subject to a mortgage to *L.*, whose executors were also defendants. At the hearing the Court [SPRAGGE, C.] declared the plaintiff entitled to the same relief as upon a bill by a *puise* incumbrancer against a prior mortgagee and the mortgagor, and that, notwithstanding R. S. O. ch. 49, sec. 5, inasmuch as he could not establish his right in the County Court, in which he had recovered his judgment, so as to obtain as effectual a remedy as that sought in the redemption suit, he might resort to equity to obtain relief.

The executors of *B.* were also liable upon the judgment recovered by the plaintiff, *B.* having been a defendant in the action, and by their answer set up that they were liable only as sureties for the defendant *S.* All parties interested were represented in the suit, and no one objecting thereto, a reference was granted at the instance of *B.*'s executors, in order that they might establish the fact of suretyship, in which case they would be entitled to the same relief as was granted in *Campbell v. Robinson*, ante vol. xxvii., p. 634.

Hearing of motion for decree, under the circumstances stated in the judgment.

Mr. Beck, for the plaintiff.

Mr. G. H. Watson, for the defendants.

Feb. 18th. SPRAGGE, C.—The plaintiff recovered judgment on the 15th of February, 1879, in the County Court of the county of Peterborough, against the defendants *Henry Sovais* and *Selina Sovais*, and one *Ferdinand Barude*, whose executors are also made parties, for \$63.18, and placed in the hands of the Sheriff writs against goods and lands. The writ against goods has been returned *nulla bona*, and the writ against lands is in the hands of the sheriff.

The bill alleges that *Selina Sovais* is seized of a certain parcel of land in Peterborough, which is subject to a prior mortgage to one *William Lundy*, whose executors are made parties. 1881.

Chamberlain
v.
Sovais.

The plaintiff prays to be let in to redeem the mortgage to *Lundy*, and for further relief. At the bar he asks for foreclosure.

The executors of *Lundy* submit to be redeemed. *Henry* and *Selina Sovais* object by answer that the relief sought by this bill might have been obtained in the County Court, and that they are put to unnecessary expense; and the same objection is now raised at the hearing.

The executors of *Barude* also answer. They admit the bill, and set up that in the judgment debt they were sureties for *Henry* and *Selina Sovais*, and they claim to be indemnified by them. They give no evidence in proof of this, and ask for an inquiry in the Master's Office.

I think the plaintiff is entitled to what he asks, *i. e.* to redeem the mortgage to *Lundy*, and to hold the mortgage and his judgment debt against the defendants the *Sovais*, and his judgment debt against the executors of *Barude*; but only in the same shape that he recovered against the executors at law. As to the objection to this bill made by the defendants *Sovais*; the plaintiff might, in the action at law, have sold the equity of redemption of the defendants *Sovais* in the land in the pleadings mentioned. He was entitled to come to this Court, if he could thereby obtain a more effectual remedy than he could obtain at law. At law he could himself purchase, but if he did so he would have to protect his debtor, the mortgagor, against the mortgage debt. Coming to this Court he proposes to pay the mortgage debt, and if not redeemed to foreclose. In this he assumes that the land is worth the mortgage debt, and something besides, not necessarily the whole amount of his own debt beyond the mortgage debt, Judgment.

1881. because he might take that course as the best thing that he could do; and he would, in the event of foreclosure, still retain the right to sue for his own debt, and I suppose, as an assignee, for the mortgage debt also, a right which he would not have if he became purchaser of the equity of redemption at common law.

Chamberlain
v.
Sovais.

The plaintiff is therefore in a more advantageous position for the recovery of his debt by coming into this Court, than he would be at law.

I do not see that the Administration of Justice Act helps the contention of the defendants. The plaintiff could not have so framed his County Court suit as to obtain the remedies that he obtains in this Court. So section 5 of the Act does not help the defendants, and section 11 applies only to interests in land which cannot be sold under legal process, but in equity only. It would be idle for a judgment debtor to go to a Court, or to a Judge in Chambers for a summons upon his debtor, to shew cause why an equity of redemption

Judgment. should not be sold.

The course that is taken by the plaintiff in this suit might certainly be taken from improper motives, in order to make unnecessary costs, or to oppress the defendants. It might be that the land was of such value as would certainly realize the plaintiff's debt beyond the mortgage, but nothing of the kind appears here, nor is even suggested by the answer put in by these defendants.

With regard to the relief claimed by the executors of *Barude* against the defendants *Sovais*. If the fact be that *Barude* was surety of the defendants *Sovais*, he was of course entitled, upon their default in payment, to file a bill to compel them to pay. His executors ask for leave to prove in the Master's Office that he was surety as alleged. All parties are before the Court, and none object to this course. Under the circumstances, I will not put the executors to file a bill. The direction will be, that in the event of the

alleged suretyship being proved, the relief will be the same as in the case of *Campbell v. Robinson (a)*. 1881.

As between the plaintiff and the defendants, the executors of *Lundy* and *Sovaia*, the relief will be the same as upon a bill by a puisne incumbrancer against a prior mortgagee and mortgagor. I do not understand that costs are asked by the plaintiff against the executors of *Barude*. If *Barude* was surety, his executors will properly be made parties in order to their remedy over; and if not a surety, there is nothing to shew that the plaintiff has a better remedy against him in this Court than at law. He cannot be entitled to costs, because, according to his own shewing, he was properly made a party. Judgment.

The costs will be on the lower scale.

Chamberlain
v.
Sovaia.

(a) 27 Gr. 634.

1881.

SCHOOL TRUSTEES OF THE TOWNSHIP OF
HAMILTON V. NEIL.*Officers of corporation—Irregular appointment of—Payment to.*

One *T.*, who acted in the capacity of Secretary-Treasurer of the plaintiffs, who had not been appointed in writing, and had not given security as required by the Statute in that behalf, absconded with certain moneys which had been received by him as such Secretary-Treasurer from the defendants. The plaintiffs had recognized *T.* as their Secretary-Treasurer by intrusting him with the custody of their books and papers, by allowing him to receive moneys for them, by auditing his accounts and receiving and approving of the auditor's reports.

Held, that R. S. O. cap. 204, sec. 99, which provides that, in the case of a rural school section corporation, the resolution, action, or proceeding of at least two of the Trustees shall be necessary in order lawfully to bind such corporation, does not apply to acts of duty of the Secretary-Treasurer; and that payment by the municipality of school moneys to *T.* was binding on the trustees.

Held, also, that, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment.

To a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation, the treasurer of the municipality is not a proper party.

This was a bill against *The Corporation of the Township of Hamilton*, and *Neil*, their treasurer, to compel the defendants to make good to the plaintiffs a sum of \$471.15, paid by the township of Hamilton to the treasurer of the plaintiffs.

In 1879, the plaintiffs required the defendants' township to levy on the property in School Section No. 7, for the purpose of paying the salaries of school teachers, to the amount of \$471.15; in obedience to which requisition the township collected the required amount and paid it into the hands of one *Turner*, who was acting as Secretary-Treasurer of the plaintiffs, and who afterwards absconded without accounting for the

amount so paid to him. The plaintiffs insisted that these moneys were trust moneys of the plaintiffs in the hands of the defendants, and that payment to *Turner* could not be received as payment to the plaintiffs. The defendant *Neil* was the treasurer of the township, and the plaintiffs contended that, as such, he was jointly bound with the township to make good the sum lost by *Turner's* default. Both the defendants *The Township of Hamilton* and *Neil* as the treasurer thereof, answered the bill, contending that the payment made to *Turner* was made by them in the usual manner, and if any loss had accrued to the plaintiffs it arose in consequence of their neglect to take security for the due discharge of *Turner's* duties as treasurer to the Board of School Trustees, of which he himself was one.

The cause came on for hearing at Cobourg, at the Autumn sittings of 1880.

Mr. J. W. Kerr and Mr. Moss, for the plaintiffs.

Mr. Hector Cameron, Q. C., and Mr. Jex, for defendant *Neil*.

Mr. S. Smith, Q. C., and Mr. Boyd, Q. C., for the Township of Hamilton.

On the opening of the case, counsel objected that *Neil* was not a proper party.

PROUDFOOT, V. C., thought that *Neil* was not a proper party, and dismissed the bill as to him.

Ewart v. Snyder (a), *Walker v. Symonds (b)*, *Kelly v. Morray (c)*, *Bank of United States v. Dandridge (d)*, *Gildersleeve v. Cowan (e)*, were referred to.

The other facts are clearly stated in the judgment.

(a) 13 Gr. 55.

(c) L. R. 1 C. P. 667.

(e) 25 Gr. 460.

(b) 3 Swan. 1, 62.

(d) 12 Wheat. 64, 70.

1881.
School Trustees of the Township of Hamilton
Neil.

1881. PROUDFOOT, V. C.—The only question is, whether the defendants or the plaintiffs are to suffer the loss of the school rate for 1879, levied by the defendants, and paid to Dr. *Turner*, one of the trustees, and who also acted as secretary-treasurer of the board.

School Trustees of the Township of Hamilton v. Neil.

31st Jan.

There does not appear to have been any written appointment of *Turner* as secretary-treasurer; but it appeared that he was appointed to the office in 1877, succeeding *Lapp*, who had previously acted in that capacity. *Turner* had possession of the cash book and papers. The cash book was the same that had been used by former secretary-treasurers, and his accounts were audited by the auditors as being accounts of the secretary-treasurer, once on the 8th of January, 1878, and once on the 6th of January, 1879.

The former report was adopted at a meeting of the trustees on the 9th of January, 1878, the latter on the 8th of January, 1879.

Judgment. At a meeting of the defendants' council on the 1st of December, 1879, the Reeve was authorized to sign orders on the treasurer in favour of the trustees of the school section in question, for \$471.15, and that the order be made payable at Cobourg on the 20th of December.

On the 1st of December the reeve signed an order on the treasurer of the township to pay to the trustees of the school section that sum, and it is now produced, indorsed by Dr. *Turner*. It does not contain any limitation of payment to the 20th of December; and it appears to have been paid by the check of the township treasurer, dated the 16th of December, for \$460.67. The difference of amount was caused by deducting Dr. *Turner's* own share of the rate.

Dr. *Turner* absconded about the middle of December, carrying off the funds.

On the 31st December the two remaining trustees sign the annual report of the school section for 1879, and it is sealed with the seal of the municipality.

which contains a statement that, "The treasurer having left with the moneys, arrangements will have to be made for payment." And *Haig*, one of the trustees signing the report, testified that *Turner* was the treasurer meant.

1881.
School Trustees of the Township of Hamilton v. Neil.

The school trustees had neglected to take any security from their treasurer, as it was their duty to do under R. S. O. ch. 204, sec. 102, sub-sec. 5, which entailed a personal responsibility for the loss upon the persons guilty of the neglect: *ib.* secs. 228-230.

The school trustees now seek to make the township responsible for the money, upon the ground that Dr. *Turner* had never been legally appointed secretary-treasurer, and therefore that the money paid to him did not get into the proper hands, and that the payment was made before the time appointed by the township council for payment.

The last objection is of no importance. The limitation was evidently placed for the benefit of the township, that it might not be called upon to pay before that date; but if they were in funds, there was no reason why it might not be paid sooner.

Judgment.

As to the former, it was argued that section 99 of the statute provides that, in case of a rural school section, corporation, the resolution, action, or proceeding of at least two of the trustees shall be necessary in order lawfully to bind the corporation. But it is clear that does not apply to the acts of duty incumbent on the secretary-treasurer. It applies no doubt to the appointment of secretary-treasurer, but it never was intended to require two trustees to sign receipts for any sum of money that should come into the treasurer's hands. In fact section 102, that defines the duties of a treasurer, clearly shews that he is to receive the money, and he is to give security to account for it properly.

The rule is laid down, and is exemplified by many cases in *Taylor* on Evidence, sec. 139, that a person

1881.
School Trustees of the
Township of
Hamilton
v.
Neill.

acting in an official capacity is presumed to be regularly appointed, and no distinction is recognized, though the appointment must necessarily be in writing or under seal, or though proceedings be criminal or in the highest degree penal. And Judge *Dillon*, in his work on Municipal Corporations, sec. 152, says, that the same presumptions which are applicable to individuals are, in general, applicable to acts of corporations. Thus, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment.

In this case the plaintiffs recognized *Turner* as their secretary-treasurer, intrusted him with the custody of their books and papers in that capacity, allowed him to receive money coming to them in their corporate capacity, had his accounts audited by their auditors, and received and approved of the auditors' reports.

Judgment.

I think it is too late now for them to say he was not legally appointed, and, though I regret to have to do it, I must dismiss their bill, with costs. And they will have to suffer for their neglect in not taking the security they ought to have done from their officer.

1881.

RE FLETCHER ET AL.

Solicitor and client—Judgment and execution—Summary application.

Upon the taxation of solicitors' costs against their client, it was shewn that large sums of money belonging to their client had reached their hands, and after deducting the amount of the costs a considerable balance remained due to the client, for which he had, under the order of taxation, issued an execution, but the sheriff had been able to realize only a small portion of the debt; and thereupon a motion was made to strike the solicitors off the roll in default of payment of the amount remaining due. The Court [BLAKE, V.C.,] however, in view of the fact that the client had treated the claim as a debt from the solicitors to himself, and proceeded to a sale of all that he could seize under execution, was of opinion that he could not fall back on a right which he had had and might have exercised, unless, in addition to the non-payment of the money, misconduct on the part of the solicitors could be shewn that would warrant the interference of the Court; and refused the application with costs.

The late *John C. Kirkpatrick*, of Chippawa, engaged *Fletcher, Caddick & Delaney* as his solicitors some years ago, and, amongst other things he gave one of the partners, *Mr. Fletcher*, a power of attorney for him to dispose of and sell a certain tannery business belonging to *Kirkpatrick* at Niagara, and the work to be done under the power of attorney involved the management and closing up of the business, which was done by *Mr. Fletcher*. All the work done by *Mr. Fletcher* under the power of attorney was charged for by the firm as solicitors in the usual way. A sale was effected of the tannery business by *Mr. Fletcher*, and a sale was also made by the solicitors of some bank stock belonging to *Mr. Kirkpatrick*, and the proceeds of the sale of the tannery business, as well as of the stock, were received by the solicitors and deposited by them to their own credit in a bank, except a part of the proceeds of the sale of the tannery, viz., \$2,000, for which a promissory note was taken by them. A part of the proceeds of the bank stock was remitted to the client,

Statement.

1881. *Re Fletcher et al.* and the client being about to go abroad about 1st of January, 1880, became anxious for a full settlement, and considerable correspondence took place between him and his solicitors. Finally on the 13th January, 1880, Mr. *Kirkpatrick* sent his son to the office of the solicitors to obtain a settlement. At that time the authority of the solicitors was terminated, and the relation of solicitor and client had ceased. A portion of the moneys realized on the sale of stock, as well as of the tannery business, had been remitted to the clients; but on the 13th January 1880, there still remained in the hands of the solicitors about \$3,000, and also the promissory note above mentioned, taken in their own names, for \$2,000, which became due and was paid to them a few days subsequently. The solicitors refused to pay over any part of the moneys in their hands, or to give up the promissory note, on the ground as stated, that they were then at arm's length; *Statement.* that they had a bill of costs amounting to \$2,000 or more, and that their bills of costs were not made up; and that the client might proceed to get them and tax them according to law; and they also refused to pay the balance of moneys in their hands, after deducting the probable amount of costs.

Mr. *Kirkpatrick* died shortly afterwards, and the petitioners were appointed executors, and subsequently obtained the usual order for taxation and payment over by the solicitors of any balance due from them. The costs were taxed at the sum of \$994.90, and the balance found due from the solicitors, was the sum of \$4,319.73. After confirmation of the report, an execution against the goods and lands of the three solicitors was issued, and a sum of about \$400 was realized out of the household effects of one of them; as to the balance, the writs were returned *nulla bona*. Thereupon a petition was presented in which, it was sought to strike the solicitors off the rolls of the Court in default of payment. Pending the application, the

solicitors were examined, and admitted the statement of facts as above, and that they had no assets whatever, and that the moneys had been used in defraying personal expenses, and in the expenses of the office.

1881.

Re Fletcher et al.

Mr. *G. H. Watson*, for the petitioners. The action of the solicitors is one calling for the exercise of the summary jurisdiction of the Court. The refusal of the solicitors to pay the balance of the money in their hands was unjustifiable, and the only reason that appears to have been given for it is, that the client at the time of the demand informed the solicitors that he would have the costs taxed. The affidavits filed and the depositions of the solicitors shew that the client then also revoked all authority previously given to the solicitors to collect money, and forbade them dealing further with any of his matters, or acting further for him in the receipt of moneys, and as far as he could he then determined their authority. At this time the solicitors had in their hands the promissory note, which although the property of the client had been taken by the solicitors in their own name. The fact that the solicitors two days afterwards received \$2,000, the amount for which this note was given, in addition to the money already in their hands, raises the presumption that they wished to obtain as much of the client's money as possible without his consent, and leaves their action open to grave suspicion. The condoning of such conduct as these solicitors have been guilty of, without punishment, would confine the summary remedy to very narrow limits, and remove the impression amongst clients that solicitors are amenable to the Court for misconduct. The solicitors have been ordered to pay the balance found due on taxation to the client, but have refused, and should be dealt with as in contempt : *Re Robinson*, (a). The client cannot

Argument.

(a) 10 B. & S. 75.

1881. *Re Fletcher et al.* be deemed to have elected between the remedy under the order and the summary remedy, simply by proceeding under the former. There cannot be any waiver where gross misconduct is established. He cited *Re Bayley (a)*, *Re Rush (b)*, *Re White (c)*, *Re Barfield (d)*, *Harvey v. Hill (e)*, *Re Atkin (f)*, *Re Knight (g)*, *Re Corbet Davies (h)*, *Stephens v. Hill (i)*, *Re Blake (j)*, *Re Wright (k)*, *Re Hill (l)*, *Ex parte Poole (m)*, *Re Sparks (n)*, *Re Townley (o)*, *Re Attorney (p)*, *Re Currie (q)*, *Re Carroll (r)*. C. S. U. C. ch. 24, secs. 13, 15.

Argument.

Mr. A. Hoskin, Q.C., and Mr. W. Cassels, contra, submitted that as the petitioners had elected to proceed by execution against the goods, &c., of the solicitors, the petitioners could not now fall back upon the right, which no doubt they originally had, of calling upon the Court to exercise its summary jurisdiction against its officers, *Re Corbet Davies (s)*.

April 5th. BLAKE, V. C.—I have read all the evidence in this matter, and do not find that in respect of the special matters of complaint alleged against the solicitors the petition has been sustained. The solicitors were at liberty to have had the note taken from *Merritt & Dickson* made payable to themselves. They were at liberty to sell and did sell the Dominion stock, and informed their client of it. The note, the proceeds of which they were instructed not to receive, had been deposited for collection, and was in St. Catharines on the

Judgment.

(a) 9 B. & C. 691.

(c) 23 L. T. 387.

(e) L. R. 16 Eq. 324.

(g) 1 Bing. 91.

(i) 10 M. & W. 28.

(k) 12 C. B. N. S. 705.

(m) 38 L. J. C. P. 216.

(o) 3 Dowl. 39.

(q) 25 Gr. 333.

(s) 15 L. T. N. S. 161.

(b) L. R. 9 Eq. 147.

(d) 24 L. T. 248.

(f) 4 B. & Ald. 47.

(h) 15 W. R. 46.

(j) 3 E. & E. 34.

(l) L. R. Q. B. 543.

(n) 17 C. B. N. S. 727.

(p) 7 P. R. 174.

(r) 2 Chy. Cham. 323.

day these instructions were given, and it was paid the same day or the day following. Almost all the moneys received by the solicitors did not come into their hands in the ordinary course of business as solicitors. Over \$3,300 was received by the sale of stock, the proceeds of which were remitted and deposited duly to the credit of the client. A sum of \$5,000 was received under a power of attorney given to one of the solicitors, to enable him to transact that part of the business of Mr. Kirkpatrick which fell to his share in carrying on a tannery. On closing the tannery some material was sold by the solicitors, and the proceeds received; and, after deducting the charges for legal expenses incurred by the client with this firm of solicitors, there remains a large balance still due. If *Re Lauder and Mulock (a)* be law, where the client applied for an order for taxation, and for the accounts needed to be taken in this cause, the order could not have been made, but a bill should have been filed. No objection, however, was made by the solicitors. The order issued, the costs were taxed, the accounts taken, the balance struck, and *fi. fas.* issued. The effects of one of the solicitors have been sold by the sheriff, and the proceeds paid to the client. The wife of another of the solicitors has claimed the goods seized by the sheriff as belonging to her husband, and an interpleader is to be tried to decide that question. The junior partner of the firm has nothing to be reached.

1881.
Re Fletcher et al.

Judgment

In *Re Robinson (b)* the Chief Justice stated the rule to be in these cases as follows: "We have consulted the Judges of the other Courts, and the result (though this is not to be taken as a decision of all the Courts) is that where an order for the payment of money is made and disobeyed the party is deemed to

(a) 6 Pr. Rep. 21. See also *Re Forsyth*, 2 DeG. Jo. & Sm. 509.
(b) 10 B. & S. 75.

1881. *Re Fletcher et al.* have elected to take his remedy by a civil proceeding, and must proceed by way of execution, as on a judgment and not by way of attachment; and we see no reason to vary that practice where an attorney is by rule of Court ordered to pay money. The civil remedy will apply in all cases unless there are special circumstances. Therefore an attachment in the present case is refused."

In *Harvey v. Hall (a)*, where a client who had been entitled to issue an attachment against his solicitor arranged to take the claim by instalments, which agreement had not been carried out, Vice Chancellor Bacon was "of opinion that under the arrangement between *Hall* and the sheriffs there had been such an interference with the terms of the original order that an attachment could not now be issued." In *Re Corbet Davies (b)* it is stated: "The Court will not grant a rule calling upon an attorney to shew cause why he should not pay over to his client money received by him as attorney for such client, when the client has issued a writ and recovered judgment for such moneys against the attorney." *Bramwell, B.*, asked: "Can this course be taken after an action has been brought and judgment recovered? * * The original debt is gone. * * You cannot call upon him by order to pay the judgment debt. * * He owes that no longer. You have changed his character from that of attorney into that of judgment debtor." See also *Re Campbell (c)*, *Re Keys, Smith, and Henderson (d)*, *Re Hamilton v. O'Rielly (e)*, *Re Toms and Moore (f)*, *Crooks v. Crooks (g)*, *Ex parte Poole (h)*, *Re Blake (i)*, *Re Hill (j)*, *Anon (k)*.

(a) L. R. 16 Eq. 324.
(c) 32 Q. B. 444.
(e) 1 Q. B. 392.
(g) 1 Gr. 57-313.
(i) 3 El. & El. 34.
(k) 5 Jur. 678.

(b) 15 L. T. N. S. 161.
(d) 34 Q. B. 246.
(f) 3 Ch. Cham. Rep. 41.
(h) L. R. 4 C. P. 350.
(j) L. R. 3 Q. B. 543.

The Court has power to strike these solicitors off the Rolls, but where, as here, the client has chosen to treat the claim as a debt from the solicitors to himself, and he has proceeded to the sale of all that he could seize under his execution, I am of opinion that, under the authorities, he must be taken to have chosen his remedy, and that he cannot now fall back on a right which he may have had, unless, in addition to the non-payment of the money, there be misconduct on the part of the solicitors which would demand the interference of the Court. I do not find that this is the case here, and so I dismiss the application, but without costs.

1881.
Re Fletcher
et al.

Judgment.

RUSSELL V. RUSSELL.

Execution creditor—Registry act—Purchaser for value without notice.

An execution creditor does not occupy as favourable a position under the Registry Act as a purchaser for value without notice; and he may be defeated by a deed made before though registered after the lodging of the execution in the hands of the sheriff. *Quære*, whether a deed of land not specifying any particular lot by description is capable of registration.

The plaintiff, who claimed title under such a deed, was held entitled to an injunction to restrain a sale by an execution creditor, of the interest which her co-defendant in the execution would have had in land but for such deed; and she was not bound to attend the sheriff's sale, explain her interest, and protest.

Motion for an injunction to restrain the sale under execution of certain lands claimed by the plaintiff, under her marriage settlement.

Mr. Boyd, Q. C., for the plaintiff.

Mr. Bethune, Q. C., contra.

1881. *Fisken v. Brooke (a)*, *Hore v. Becher (b)*, *Parke v. Riley (c)*, *Waters v. Shade (d)*, *Adams v. Loomis (e)*, *Allen v. The Edinburgh Life Assurance Co. (f)*, *Chisholm v. Sheldon (g)*, *Acton v. Pierce (h)*, *Fitzgibbon v. Duggan (i)*, *Williams v. Reynolds (j)*, *Dougall v. Turnbull (k)*, *Wightman v. Fields (l)*, *Wilson v. Corby (m)*, *Duggan v. Kitson (n)*, were referred to by counsel.

Nov. 10th, 1880. SPRAGGE, C.—Mr. *Boyd's* contention is, that the interest of the husband under the *ante nuptial* settlement is saleable under execution at law, *i. e.*, not only his reversionary interest contingent upon his surviving the plaintiff, his wife, but his beneficial interest jointly with his wife in the usufruct of the land, conveyed during their joint lives.

I agree with Mr. *Boyd* that the husband's reversionary interest is saleable, but I take *Fisken v. Brooke (o)*, to be an authority that the beneficial interest of the husband during the joint lives of himself and his wife is not saleable, and Mr. *Bethune*, for the defendant, the execution creditor, declares that the creditor does not seek to sell any interest of the husband other than his reversionary interest.

The bill prays that the rights and interests of the plaintiff under the *ante nuptial* settlement may be ascertained and declared. "That it may be declared that she is entitled to receive the rents issuing out of the said lands or reserved under and by virtue of the said indenture of the 1st November, 1878. That the defendant, *J. A. Russell*, may be restrained by the order

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| (a) 4 App. R. 8. | (b) 12 Sim. 465. |
| (c) 3 E. & A. 215. | (d) 2 Gr. 457. |
| (e) 22 Gr. 99; 24 Gr. 242. | (f) 25 Gr. 306. |
| (g) 3 Gr. 653. | (h) 2 Ver. 480. |
| (i) 11 Gr. 188. | (j) 25 Gr. 49. |
| (k) 8 U. C. R. 622; 10 U. C. R. 121. | |
| (l) 19 Gr. 559. | (m) 11 Gr. 92. |
| (n) 20 U. C. R. 316. | (o) 4 App. 8. |

and injunction of this Honourable Court from further proceeding to sell any alleged right, title, and interest of the defendant *William Russell* in the said lands, and from further proceeding with said sale, and further endeavouring to have the said rents applied in satisfaction of his said judgment, and from otherwise creating any cloud upon her said title and interest under the said settlement." The sheriff has advertised for sale the right, title, and interest of the husband, the execution debtor, in certain lands, which are part of the subject of the settlement. And the attorney-at-law of the execution creditor appears to have claimed, erroneously in my opinion, a right to sell the land in question in disregard of the settlement. In a letter dated the 29th September, 1880, addressed by him to the solicitor of the wife, he says, "At present I do not see how an execution creditor, with writ in the sheriff's hands, is to be restrained or defeated by a grantee for good consideration but unregistered," thus placing an execution creditor upon the same footing as a purchaser for value without notice, who has registered before a prior purchaser for value. The judgment in appeal in *Beavan v. Lord Oxford* (a), is against this position. I refer particularly to p. 517 *et seq.* of the judgment.

1881.

*Russell
v.
Russell.*

Judgment.

The creditor then having as I conceive a right to sell the reversionary interest of his debtor, a tangible interest of more or less value according to circumstances, but certainly of some value, not of merely nominal value, proposes to sell in disregard of the settlement the interest which the debtor would have had if he had not parted with a portion of his interest by the settlement; and the question arises whether this is a ground for coming to this Court to restrain the sale.

As yet the plaintiff is not injured. She apprehends that she may be injured if the sale is carried out as proposed. It may or may not be so carried out. We

(a) 6 D. M. & G. 507.

1881. have upon that point the then present opinion—"At present I do not see," &c.—of the attorney of the creditor, that the settlement was of no avail, and it may be presumed that he intended, unless otherwise advised, to act upon his opinion. Is that a sufficient reason for filing a bill in this Court? If a wrong be threatened and intended, it is in some cases a ground for injunction, but if the threatened wrong can be averted by the person whose interests might be affected by it, if committed, the Court I apprehend will not grant an injunction, it will regard the coming into this Court as an unnecessary proceeding.

Russell v. Russell.

Here the execution creditor had a certain legal right which he was proceeding to exercise. He conceived his right to be greater than it really is. If it was as extensive as he conceived it to be the plaintiff's rights under the settlement would be impaired. If he acted upon his opinion and actually sold and the purchaser obtained and registered a sheriff's deed, the plaintiff's position might be complicated by her having to make the purchaser a party to a suit in assertion of her right, if he after purchase took the same ground as was taken by the creditor's attorney before the sheriff's sale. I think the mischief that might ensue upon a sale cannot be placed higher than this; but still that it may be placed as high as this.

Judgment.

Then could the plaintiff have averted this possible mischief by any act which under the circumstances she might reasonably be expected to do? If she could register the settlement which created her interest in the land she would only be doing that which almost every grantee of land does for his own protection without any special occasion arising for the doing of it. This settlement, however, does not specify the land in question, but conveys to the intended wife any (meaning no doubt all) of the estate, personal or real, of the intended husband, and it is made a question whether the grantee could register this conveyance.

1881.

Russell
v.
Russell.

If she could the registration would afford her all reasonable protection. If she could not she would be less secure, as there would be danger of the purchaser at sheriff's sale registering the sheriff's deed, and thereby cutting out her rights under the settlement: *Waters v. Shade* (a). I do not know that there is any decision upon the point. The language of the Registration Acts certainly points to there being a description of particular land in the instrument to be registered.

If it is now a moot point whether the settlement could be registered, one of the means suggested for averting the complications that might arise upon a sale by the sheriff may not be available.

It is suggested, however, that the plaintiff might by herself or her agent attend at the sale, explain her interest in the land, and protest against the sale of anything beyond the reversionary interest of the execution debtor. But I think that she ought not to have been put to this, but that if the creditor were about to proceed to a sale, which might reasonably be expected to prejudice her in the way that has been explained, she would be justified in filing a bill. Judgment.

In the bill that she has filed she asks too much, inasmuch as she seeks to enjoin the creditor from selling at all. But, on the other hand, there is no evidence before me that the attorney of the execution creditor did before the sale recede from the position taken by his letter of the 29th of September. As far as there is any evidence before me this position of the execution creditor was not receded from until the hearing before me of this application for injunction.

I think the proper course for me to take will be, upon the defendant *James A. Russell* undertaking that at the sheriff's sale the only interest offered for sale shall be the contingent reversionary interest of the defendant *William Russell* (the husband of the

1881. plaintiff), to declare by order that the Court, by reason
of such undertaking being given, doth not direct that
an injunction do issue; or an injunction may issue
restraining *James A. Russell* from offering at sheriff's
sale any other interest than such reversionary interest
of *William Russell*.

Judgment. There seems no dispute as to the rights of the parties.
The real question has been whether the plaintiff has
come into Court unnecessarily. If the marriage settle-
ment is not a registrable instrument, or if it is a
reasonably doubtful question whether it is so or not, I
should say she was justified in filing her bill.

It would be a pity that the suit should proceed
farther. If she was right she ought to have her costs.

1881.

GILCHRIST v. WILEY.

Demurrer—Equitable garnishment.

The plaintiffs, who had recovered judgment against the defendant *W.*, filed a bill alleging that *W.* being the owner of lands subject to a mortgage, conspired with his co-defendant whereby a second mortgage was executed by *W.* to one *A.*, who paid the money to the co-defendant, which was held by him as agent or trustee for *W.* The lands were subsequently sold in a suit by the first mortgagee, and realized sufficient to pay the two mortgages only. The plaintiffs proved their claim in that suit in the Master's office, but received nothing. They alleged that they had been led to believe that the mortgage by *W.* to *A.* was *bonâ fide*, but had ascertained that such was not the fact; and prayed that the co-defendants might be ordered to pay over the amount paid out of the proceeds of the land to satisfy the mortgage in favour of *A.*

Held, that the bill was in effect one to garnish the money due to *W.* in the hands of his co-defendant, and under the authority of *Horsley v. Cox*, L. R. 4 Ch. 92, and *St. Michael's College v. Merri- 1* App. R. 520. S. C. 26 Gr. 216, could not be maintained.

This bill filed by *John Gilchrist* and *William Reid Kent* against *Samuel Wiley* and *Robert Wilson*, setting forth that the plaintiffs had, on the 26th July, 1873, recovered a judgment against the defendant *Wiley* and one *James Wiley* for \$456.89, which remained unpaid; that the defendant *Wiley* owned the east half of lot 25 in the first concession east of Hurontario street in the township of Mono when the liability arose, subject to a mortgage in favour of one *Gzowski* for \$600. The bill further stated that the defendants conspired together to defeat the claim of the plaintiffs, and for that object created a mortgage in favour of one *Ardagh*, for \$400, who paid the amount of the mortgage money to the defendant *Wilson*, who held and retained the same as agent or trustee for the defendant *Wiley*; that subsequently the land was sold under a decree of this court in a suit instituted by *Gzowski* on his mortgage, and the same realized sufficient to pay the two mortgages

1 Statement.

1881.

Gilchrist
v.
Wiley.

thereon, but no surplus remained to apply on plaintiffs' claim, who were made parties in the Master's office and proved their claim, which was allowed by the Master at \$500. The bill further alleged that but for this fraudulent mortgage the plaintiffs would have received \$475.80 from the proceeds of the land on account of their claim; that the defendants had concealed from the plaintiffs the fact that the mortgage in favour of *Ardagh* had been executed in fraud of the plaintiffs, who were led to believe and did believe that the same was made in good faith, and they had not discovered that such was not the case until November, 1880. The plaintiffs submitted that the defendant *Wilson* should be ordered to pay to them the amount of \$475.80 so paid to him out of the proceeds of the sale under decree, and prayed relief accordingly.

The defendant *Wilson* demurred, on the ground that the bill should have been on behalf of other creditors as well as the plaintiffs, and for want of equity.

Mr *J. M. Reeve*, for the demurring defendant.

Mr. *Moss*, contra.

May 18th.

BLAKE, V. C.—The bill alleges the recovery of a judgment against two debtors: that *Samuel Wiley*, one of the debtors and a defendant in this suit, owned lands subject to a mortgage; that he entered into a conspiracy with the co-defendant whereby *Wiley* executed a mortgage to one *Ardagh* for \$400, who paid this amount to the defendant *Wilson*, who holds it as agent or trustee for the defendant *Wiley*; that the lands were sold in a suit instituted by the prior mortgagee, and realized sufficient to answer only the claims of these two mortgagees, and the plaintiffs, who had proved in the Master's office in that suit under their judgment, recovered nothing, the amount which would have been otherwise paid to

them having gone in discharge of the *Ardagh* mortgage; and that except for the mortgage executed by *Wiley* at the instance of the defendant *Wilson* to delay and defraud the plaintiffs, the plaintiffs would have received \$475.80 from the proceeds of the sale on account of their claim. That the defendants concealed from the plaintiff the fact that the mortgage was executed in fraud of the plaintiffs, and led them to believe that it was *bona fide*, and that the money received from *Ardagh* was legitimately applied by the defendant *Wiley* for legitimate purposes. The plaintiffs submit that the defendant *Wilson* ought to be ordered to pay the amount paid out of the lands to satisfy the *Ardagh* mortgage, and the bill asks that he may be ordered to pay such amount and the costs of the suit. *Ardagh* is not made a party to the suit, nor is it sought to impeach the mortgage in his hands. It must be taken on the pleading that so far as he is concerned the mortgage is *bona fide* and that in good faith he advanced the \$400 and paid it over to *Wilson*, the appointee of *Wiley* the mortgagor. Judgment.

1881.
Gilchrist
v.
Wiley.

The bill is then merely one to garnish the amount due in the hands of the defendant *Wilson* to the defendant *Wiley*. The cases of *Horsley v. Cox* (a), and *St. Michael's College v. Merrick* (b), shew this cannot be done by bill.

I allow the demurrer.

(a) L. R. 4 Ch. 92.

(b) 1 App. 520, 526, 544 and 26 Gr. 216.

1881.

OWSTON V. THE GRAND TRUNK RAILWAY COMPANY.

Railway Company—Purchase of right of way—Pleading—Certainty of allegation—Tenant for life.

A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the ceaser of the life-estate the parties entitled in remainder filed a bill stating that the railway company *assumed* to purchase the lands for the right of way; that the company *alleged* that they had paid the full consideration for the land to the tenants for life; submitting that *even if* the company did make such payment they did so in their own wrong, and asking for payment of the plaintiffs' share of the purchase money:

Held, (1) that the word "assumed" was a sufficient allegation of the fact of sale, and conveyance. But (2) that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground.

After the judgment was given as reported, ante volume xxvi., page 93, the plaintiffs amended the 7th paragraph of their bill by altering the statement of an absolute purchase from *Williams*, and alleging in lieu thereof, that the railway company *assumed* to purchase a portion of the said lands sufficient for the right of way of the said railway company.

The 8th paragraph was also amended by striking out the words, "Shew the contrary of the said allegation to be true, and they," and that paragraph which was as follows: "The defendants, the Grand Trunk Railway Company, allege that they purchased and took a conveyance from the other defendants of the fee simple of the right of way, and paid the said defendants the full purchase money for such fee simple. The plaintiffs *shew the contrary to be true, and they* submit that even if the said defendants, The Grand Trunk Railway Company, did make such payment, they did so in their own wrong, and they ought to have retained or secured for the plaintiffs, or those through whom they claim, the value of their estate

in remainder in the said lands," then read thus: 1881.
 "The defendants, The Grand Trunk Railway Com-
 pany, allege that they purchased and took a convey-
 ance from the other defendants of the fee simple of
 the said right of way, and paid the defendants the
 full purchase money for such fee simple. The plain-
 tiffs submit that even if the defendant's, the Grand
 Trunk Railway Company, did make such payment,
 they did so in their own wrong," &c.

Owston
 v.
 Grand Trunk
 R. W. Co.

The same defendants again demurred for want of equity.

Mr. MacLennan, Q. C., for the defendants, who demurred.

Mr. Moss, contra.

SPRAGGE C.—Upon the argument of the demurrer, I expressed the opinion that the meaning of the 7th paragraph of the bill, must be taken to be that the subject of purchase from the trustees of *John Tucker Williams*, was the land required by them for their roadway, and not the interest only, of the trustees in the land: and upon reading the bill since, I am of the same opinion.

It was competent for those representing the estate for life, as I thought in *Cameron v. Wigle* (a), to contract with the railway company for the sale of the fee, and to convey the fee to the company; and the allegation is, that the trustees "assumed" to do both. I do not think that the use of the word assumed makes the allegation uncertain; there is nothing in the bill to shew that what they assumed to do was not done effectually, but the contrary; for the plaintiffs' claim is made to rest upon the contract and conveyance, having the effect of divesting the title of those entitled in remainder, as well as those entitled for life, and vesting the whole in

Judgment.

(a) 24 Gr. 8.

1881. the railway company. I read the word "assumed" in this paragraph to mean that such acts were done as were intended to have the effect of a contract between the parties, and of a conveyance from the one to the other, and were taken by them to have that effect, and there is nothing to negative their having that effect.

Owston
v.
Grand Trunk
R. W. Co.

Taking paragraph seven to mean what I have interpreted it to mean, it is still contended that the facts necessary to constitute a claim against the trustees of *Williams* are not alleged with sufficient certainty. The necessary fact is, beside the contract and conveyance, payment by the railway company to the trustees of the whole price of the land. That is the one necessary fact; and it certainly was a fact (if fact at all) to which the plaintiffs were not parties, and a fact peculiarly within the knowledge of the demurring parties and the railway company.

Judgment. Still it is a fact essential to the plaintiffs' case. If upon such contract and conveyance the whole purchase money had been clearly payable to the trustees, such an allegation as we find in the eighth paragraph might possibly be sufficient. But the proper course of the company, for their own safety, the title being as it was, was to pay the purchase money into court. The allegation in the eighth paragraph, as to the payment of purchase money, is, that the railway company allege that they paid to the trustees the full purchase money for the fee simple; and the bill goes on to say that if the railway company did make such payment they did so in their own wrong. The plaintiffs thus allege in effect that they do not know as a fact whether the railway company did make such payment or not. Unless they did make such payment the case against the trustees fails.

It comes then to this; that a fact, without which there is no case at all against the demurring defendants, is not alleged as a fact in the case; but the only allegation as to that fact is, that another party to the cause,

the railway company, alleges such to be the fact. There is nothing in *Grant v. Eddy* (a) to warrant this as sufficient pleading; and *White v. Smale* (b) is directly against it.

I come to the conclusion therefore, somewhat unwillingly, I confess, that the bill contains no sufficient allegation as to that fact, and that the demurrer must be allowed.

1881.
Owston
v.
Grand Trunk
R. W. Co.

SAME CAUSE.

Railway company—Payment for lands taken for road—Pleading—Parties—Demurrer.

An "action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another." Therefore, where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman.

Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors * * * of money, to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs."

After the judgment on the foregoing demurrer the eighth paragraph was again amended so as to read as follows: "The defendants, The Grand Trunk Railway

Statement.

(a) 21 Gr. 568.

(b) 22 Bea. 72.

1881. Company, allege, *and the fact is* that they purchased and took a conveyance from the other defendants of the fee simple of the said right of way, and the said Grand Trunk Railway Company further allege, and the plaintiffs charge, and the fact is, that they, the said Grand Trunk Railway Company, paid the said other defendants the full purchase for such fee simple. The plaintiffs submit that although the said defendants, the Grand Trunk Railway Company, did make such payment they did so in their own wrong," &c.

Owston
v.
Grand Trunk
R. W. Co.

The same defendants again demurred for want of equity.

The same counsel appeared for the parties.

SPRAGGE, C.—This demurrer, as well as two previous demurrers to the plaintiffs' bill, is by the defendants *Williams*. The present demurrer raises a question which might have been, and I should say ought to have been raised upon the first demurrer, if raised at all. The reason given for not raising it before is, that it was not thought of.

It goes to the root of the plaintiffs' case, and the contention is, that assuming that the plaintiffs' case is now fully stated, they have no *locus standi* in Court against the demurring defendants.

Judgment.

I thought in *Cameron v. Wigle* (a), that the railway company which had omitted to avail itself of the protection afforded by C. S. C. ch 66, sub-section 23 of section 11, and had paid to a tenant for life, compensation for the whole price, as the value of the fee simple, was liable to the parties entitled in remainder to a proper proportion of such compensation.

In this case there is the additional circumstance that parties representing the estate of the tenant for life, are made parties for the sake of the remedy over by the railway company, for the amount paid to the tenant

(a) 24 Gr. 8.

for life, in excess of the due proportion payable to him; and which excess is the proportion properly payable to the parties entitled in remainder. 1881.

The argument in support of the demurrer is, that the parties demurring, are not proper parties; that there is no remedy over; that the railway company paid what they paid under no mistake of fact, and consequently cannot recover it back.

This, in my opinion, is answered by the concluding provision of sub-section 22, of the same section, which, after providing that the compensation for any lands taken without the consent of the proprietor, shall stand in the stead of such lands, and that any claim to, or incumbrance upon the said lands or any portion thereof, shall, as against the company, be converted into claim to the compensation, or to a like proportion thereof; and that they shall be responsible accordingly whenever they have paid such compensation or any part thereof to a party not entitled to receive the same, which so far is the case here, as stated by the bill; then is added: "Saving Judgment always their recourse against such party." These words can have no other meaning than (applying it to this case) that a party having a claim to land as entitled in remainder, the claim is converted into a claim for compensation for a like proportion of compensation as the value of his interest in the land would bear to the whole value or price of the land. The owner of the life estate received the whole compensation, being entitled only to a proportion; and the company is responsible accordingly to the party entitled in remainder. Then the Legislature conceiving that the company should recover the overpayment from the person who had received it, gives, as I understand the provision, recourse or remedy over to recover back money paid to a party not entitled to receive it.

I incline to think also that the plaintiffs are entitled to a direct remedy against the estate of *Williams*. An action for money had and received has been held to lie in cases somewhat analogous.

1881.
 ———
 Owston
 v.
 Grand Trunk
 R. W. Co.

The case nearest to this is perhaps *Follett v. Hoppe*(a). The head-note upon this point states shortly the question. "A trader having been arrested on a *Ca. Sa.*, at the suit of the defendants, who, as well as the sheriff's officer had received notice of a prior act of bankruptcy, paid over a portion of his assets to the officer in order to procure his discharge, and the officer paid over the amount to the defendants. Held that the bankrupt's assignees were entitled to recover back from the defendants the amount so paid in an action for money had and received." *Wilde, C. J.*, in delivering judgment said, "The action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come into the hands of another." And *Maule, J.*, put the point in a shape applicable to the position of the parties here. "The payment * * being made by the bankrupt out of his assets, to which the plaintiffs were entitled, and having passed into the hands of the defendants, without the authority of the plaintiffs, it became money had and received to the use of the plaintiffs, and they were therefore entitled to recover it in this form of action." The application is obvious; the payment being made by the company to the executors of *Williams* of money, to a proportion of which the plaintiffs were entitled, and this payment being made without the authority of the plaintiffs, it became money had and received by the executors to the use of the plaintiffs.

Judgment.

But we are not at any rate embarrassed with difficulties as to the form of action. If the executors of *Williams* received moneys to which, or a portion of which the plaintiffs are entitled, receiving it as they did, as the purchase money of land, to a portion of which purchase money the plaintiffs are entitled, they must, I apprehend, be bound to account for it in this Court, and that whether under the statute the com-

(a) 17 L. J. C. P. 76.

pany could or could not properly pay the whole purchase money to the tenant for life. 1881.

It is true that the bill is not framed with a view to a direct remedy against the executors of *Williams*; but the bill alleges all facts which in my opinion are necessary to entitle the plaintiffs to such direct remedy, and the prayer beside being appropriate to the frame of the bill contains the prayer for general relief.

In the view that I take of the case I have not thought it necessary to discuss the question whether the later Act referred to in argument, 24 *Vict. c. 17*, applies to this case or not, because I think the former Act C. S. C. ch. 66, 14 & 15 *Vict.* is sufficient for the plaintiffs. Judgment.

The demurrer is over ruled, with costs.

Owston
v.
Grand Trunk
R. W. Co.

ROSS v. POMEROY.

Reveror—Statute of Limitations—R. S. O. cap. 108.

Where a right to relief in respect of lands arises during the progress of a cause, and more than ten years are allowed to elapse before acting thereon, such right will be barred by "The Real Property Limitation Act."

The plaintiffs, the administrator and heirs-at-law of a mortgagee, filed their bill against the mortgagor on or before the 20th October, 1864. After service, and on 15th November, 1864, an agreement was entered into between the parties, whereby the plaintiff took notes for the mortgage money, the first payable 1st June, 1866, and the others in the six following years, whereupon proceedings on the mortgage were suspended. The defendant made a payment in June, 1867, and died in 1869. The notes were not paid. The suit on 29th August, 1879 was revived against the infant heir of the mortgagor. Held, that the claim of the plaintiffs was barred by R. S. O. cap. 108 sec. 23; but in case of the plaintiffs desiring to obtain the fruits of a judgment recovered against the original defendant, the bill was retained for a year as against the infant defendant, as he would be a proper party in a proceeding against the personal representative of his ancestor to enforce the judgment.

The material facts seemed to be that one *John Pomeroy* executed a mortgage upon the premises in question,

1881. being one hundred acres in the township of Camden, in favour of one *Douglass Prentiss*, who had since died, and the plaintiff *Charles S. Ross* had taken out letters of administration to the estate. Default having been made in payment of the mortgage money, a bill was filed by *Ross* and the several heirs-at-law of *Prentiss*, on the 20th October, 1864, alleging that the time for payment had elapsed, and was duly served on the defendant *John Pomeroy*.

Ross
v.
Pomeroy.

After service of the bill, the defendant *Pomeroy* entered into an arrangement with *Ross* for the extension of the time for payment of the mortgage money for seven years; the defendant giving seven promissory notes, the first falling due on the 1st June, 1866, and the others on the 1st of June in each year thereafter, the last becoming due 1st June, 1872. And *Ross* then signed a receipt or memorandum of agreement in the words following: "Kingston, November 15th, 1864, Received from Mr. *John Pomeroy* the undermentioned notes, on account of his mortgage to the late *Douglass Prentiss*, Esq., on south half of lot No. 14, in 4th concession Camden. If the first six notes shall be punctually paid all proceedings in the action at law, and in equity, are to be suspended: upon the payment of the last note, the mortgage action and suit are to be fully discharged, except as to costs already incurred, which are to be paid by Mr. *Pomeroy*." Then followed a list of the several notes, and their amounts, in all, \$1860. *Pomeroy* died intestate, in 1869, and nothing further was done in the suit until August, 1879, when an order to revive was obtained by the plaintiffs against *Charles Pomeroy*, the then infant heir-at-law of the mortgagor, who answered the bill, setting forth that no decree had ever been pronounced in the cause; that *John Pomeroy* had died in 1869, and that since service of the bill in October, 1864, no step whatever had been taken in the cause until the issue of the order of revivor, in August, 1879; that no payment had been made

Statement.

on account of the mortgage since July, 1867; and alleged that at the time such order of revivor had been obtained, the mortgage debt had been barred by the Statute of Limitations; that the plaintiffs were not entitled to revive the suit, and that the order to revive was void, and ought to be set aside. The answer also stated that the plaintiffs contended that by the agreement above set forth the proceedings in the cause were stayed, and that as additional security to the debt the original defendant gave such promissory notes, the last of which fell due in June, 1872, and that the giving of such notes kept the debt alive against the statute; but the defendant submitted that the giving of such notes would not have that effect, and that no money had been paid in respect of the notes or the mortgage debt, since July, 1867; and he craved the benefit of "The Real Property Limitation Act."

The cause came on to be heard by way of motion for decree.

Mr. *MacLennan*, Q. C., for the plaintiffs.

Mr. *Plumb*, for the defendant.

Hollingshead's Case (a), *Hovenden v. Annesley* (b), *Egremont v. Hamilton* (c), *Perry v. Jenkins* (d), were referred to.

SPRAGGE, C.—This bill was filed by *Ross*, administrator of the mortgagee *Prentiss*, before or on 20th October, 1864. Served on *Pomeroy* on that day. May 21.

The date of the mortgage was the 15th November, 1844. It is not shewn when payable. After service of the bill an arrangement was entered into between *Ross* and *Pomeroy* for giving time for payment of mortgage money, by the giving of seven notes; this was on the 15th November, 1864. The aggregate amount

(a) 1 P. W. 742.

(c) 1 B. & B. 516.

(b) 2 Sch. & Lef. at 636, 639.

(d) 1 M. & C. 118.

1881.

Ross
v.
Pomeroy.

1881. of the notes was \$1860; the first payable 1st June, 1866, and the others in the six following years. An agreement in writing (at time of arrangement it would seem) was given by *Ross* to *Pomeroy*, to suspend proceedings at law and in equity, if the first six notes should be punctually paid.

Ross
v.
Pomeroy.

Pomeroy died 16th July, 1869, intestate.

It is alleged that four promissory notes fell due after his death. Three must have fallen due before his death, viz: on 1st June, 1866, 1867, and 1868. The last payment made by him was in July 1867: whether that paid the note due in June, 1867 is not stated. If it did, there would be no default afterwards until 1st of June, 1868.

At that date there would be default, and the Statute of Limitations, it would seem, would commence to run against the mortgage, and the time would have expired under the Ten Years' Limit Act, in June, 1878, if not interrupted by the death of *Pomeroy* in July, 1869. The suit became abated by the death of *Pomeroy* at that date. The order of revivor was issued on the 29th of August, 1879, more than ten years after the abatement.

Judgment.

This is not a case in which the Court has any discretion. There has been no decree, not even a decree for an account, and it is not a case in which the Court proceeds on analogy to the Statute of Limitations, but the statute applies to the case in terms. R. S. O. c. 108, s. 23.

This bill was filed originally against the mortgagor, and is by revivor against the infant defendant. If the plaintiffs desire to obtain the fruits of the judgment recovered against *Pomeroy*, they must proceed against his personal representative.

The guardian of the infant is entitled to his costs; but I think the proper course will be not to dismiss the bill against him, because he would be a proper party in a proceeding against the personal representative on the judgment. The bill will be retained for a year in order to the plaintiffs proceeding upon the judgment if so advised.

ROBLIN v. ROBLIN.

Marriage, Conspiracy to bring about, when one party intoxicated—Subsequent acknowledgement of validity of—Alimony—Undertaking to receive wife—Costs.

In order to render void a ceremony of marriage otherwise valid, on the ground that the man was intoxicated, it must be shewn that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of knowing what he was about.

Semble: A combination amongst persons, friendly to a woman, to induce a man to consent to marry her, it not being shewn that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid the marriage.

A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about is voidable only and may be ratified and confirmed.

Three years after the ceremony of marriage, which the man alleged he had been induced to enter into while under arrest and intoxicated, an action at law being brought against him for necessities furnished to the woman, and for expenses incurred in the burial of her child, in which the validity of the marriage was distinctly put in issue, the man signed a memorandum indorsed on the record in which he admitted the existence and validity of the marriage, and consented to a verdict for the plaintiff in the action:

Held, that if the marriage was previously voidable, it was thereby confirmed.

In a suit by the woman for alimony brought seventeen years after the marriage on the ground of refusal by the man to receive her as his wife, he set up the invalidity of the marriage, but while under examination stated that if it was determined that she was his wife he would receive her as such. The Court, [PROUDFOOT, V. C.,] while finding there was a valid marriage directed that upon the defendant undertaking to receive the plaintiff as his wife, the bill should be dismissed; but ordered the defendant to pay the costs between solicitor and client.

The plaintiff, by her bill filed in the year 1880, alleged in substance that on the 6th of July, 1863, she was duly married to the defendant; that there was born of the marriage a child which died shortly after birth; that soon after the marriage the defendant deserted the plaintiff, and they had never since lived

Statement.

1881.

Roblin
v.
Roblin.

together; that in May, 1880, she went to the defendant's house, and applied to him to receive her and allow her to live with him as his wife, but that he had refused to do so or to treat her as his wife. The prayer was for alimony in the usual form.

The defendant answered the bill alleging in substance that he was induced to go through the form of a marriage with the plaintiff at Rome in the State of New York, he and the plaintiff being then natives and citizens of Canada, having their residence in the township of Sidney; that such ceremony was the result of a conspiracy entered into between the plaintiff and others to procure him to marry her, and in pursuance of which they caused him to be arrested on a false charge, and afterwards induced him to partake of intoxicating liquors to such an extent that he was rendered incapable of understanding what he was doing, and when in that condition and under duress from said arrest, he went through the form of a ceremony of marriage with the plaintiff, and that immediately after he became aware of what he had done he left the plaintiff and never afterwards acknowledged her to be his wife, and he submitted that the said marriage was invalid and void. He admitted that the plaintiff came to his house as stated, and said he was willing to receive her and did receive her but that she would not remain with him, and went away without cause.

Statement.

The cause was tried before Proudfoot, V. C., at the sittings of the Court at Belleville, in May, 1881.

It appeared that the plaintiff and defendant had cohabited together under, as plaintiff alleged, a promise of marriage; that in the latter part of June, 1863, she being then *enciente*, they went from the township of Sidney, where they had always resided with their respective parents, to the State of New York. The reason of their going was differently stated by each, the plaintiff stating that the defendant induced her to go in order that they might get married: the defendant

alleging that it was in order that they might conceal the shame of the birth of an illegitimate child.

After being a short time away they went to Rome, N. Y., and while there the defendant seemed disinclined to marry the plaintiff, although she was constantly soliciting him to do so. She made the acquaintance of one *Carroll* at whose house she stayed for some time, and he on hearing of the relations between her and defendant advised her to swear an information of bastardy against the defendant, which she did, and defendant was thereupon arrested and brought before one *Blair*, a Justice of the Peace. While the defendant was in custody an interview took place between him and the plaintiff at which, according to plaintiff, he agreed to marry her; and it was arranged that they should go to *Blair's*, and get married in the evening.

During the afternoon the defendant remained in the company of *Carroll* and one *Wild* a constable and his son. It appeared they were drinking together, and according to the evidence of *Carroll* and the younger *Wild* the defendant was induced by them to drink in order to get him into a condition to consent to the marriage. It appeared however that the plaintiff had no part in or knowledge of these proceedings on the part of *Carroll* and the *Wilds*.

In the evening the defendant called for the plaintiff at *Carroll's* house where she was staying, and they together went to *Blair's* who married them. They then retired to *Carroll's*, and spent the night together in the same room occupying the same bed.

The next day the defendant went away from Rome, and did not return. Soon afterwards the plaintiff returned to Sidney where her child was born. The defendant remained away for over two years, and then returned to his father's house near to where plaintiff was living, but they had no communication with one another, although she was always called, and spoken of as "*Mrs. Roblin*."

1881.

Roblin
v.
Roblin.

Statement.

1881.

Roblin
v.
Roblin.

In 1866 the plaintiff's brother brought an action against the defendant for necessaries furnished by him to plaintiff and for the expenses of the burial of her child. The real object of the action was to establish the validity of the marriage, and both parties were prepared for trial upon that issue; but before the cause was called on the defendant agreed to settle the matter, and a memorandum was then indorsed on the record and signed by the defendant, by which he admitted the authority of *Blair* to perform the ceremony of marriage between him and the plaintiff and the validity and existence of the marriage and consented to a verdict for \$100; and a verdict was entered accordingly. No further communication took place between the plaintiff and defendant until May, 1880, when the plaintiff becoming, as she alleged, unable to support herself by her own labor went to the defendant's house and met him in the yard and asked him to receive her as his wife. He pointed to the open door and said, "there is the house," and went away to the barn. He returned sometime afterwards, and the plaintiff then asked him to speak to her. He pushed by her and again went to the barn. His sister who lived in the house would not speak to the plaintiff, and after waiting a couple of hours and the defendant not returning she went to a neighbour's house and stayed all night. Next morning, at her request, the neighbour went to the defendant and asked him to receive the plaintiff. The defendant said he would not, that she need not come back. Thereupon the bill was filed.

Statement.

At the trial one *Vantassel* swore that before the plaintiff came to defendant's house the defendant told him he was aware she intended to come, and that if she did, "she would receive a cool reception." After she was there the defendant told him, "She did get a cool reception."

At the hearing the defendant was examined on his own behalf, and then stated that if it should be deter-

1881.

Roblin
v.
Roblin.

mined that the plaintiff was his wife he would receive her as such. Prior to the hearing the defendant had been examined on his answer, when his statements differed materially from what was attempted at the hearing to be established by witnesses called on his behalf.

Mr. Moss, (Mr. J. Parker Thomas with him,) for the plaintiff.

Mr. Wallbridge, Q. C., and Mr. S. H. Blake, Q. C., for the defendant.

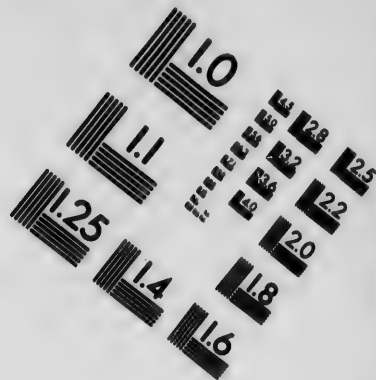
At the conclusion of the argument.

PROUDFOOT, V. C.—The only question it seems to me for decision is, whether there was a marriage between these two parties or not. I quite agree with a great deal of the law contended for by Mr. Blake and Mr. Wallbridge on the subject that consent is necessary to the perfecting the contract of matrimony. That you cannot force a man to be married against his will, and that the consent must be an intelligent consent, and not one that his mind does not go with.

Now, there is a great number of matters in this case that make one uncertain as to the conclusion one ought to arrive at. They are capable of so many different interpretations and might arise from so many different intentions on the part of those interested. The plaintiff tells us, for instance, that she left here with the object and for the purpose of getting married; now, one does not understand very clearly the necessity for leaving here in order to get married when the marriage might just as well have taken place here as have taken place in the States. However, she says that that was the intention; that she was induced to go by the defendant himself, who from some extraordinary feeling of shame that seems to have taken possession of him, was

Judgment.

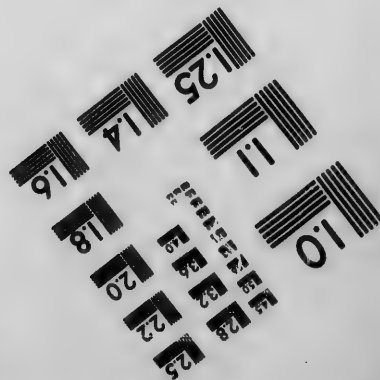
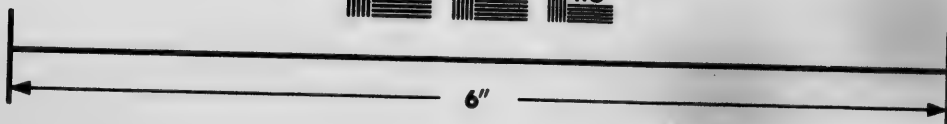




Resolution Test Chart Labels:

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1881. unwilling that the ceremony should be celebrated here where their friends would be aware of it, but was willing that it should take place in the States. The defendant denies that.

Roblin
v.
Roblin.

However, we find they go together as far as Prescott, from there to Odensburg, and thence to Rome, plaintiff harping every day upon getting married, the defendant after leaving here apparently refusing to carry out his intention. Then took place the occurrences which have given rise to so much doubt and uncertainty in defendant's mind, that he says he really not know whether he is married or not.

I think I will have to relieve him of that doubt, and I think the decree I will have to make upon the evidence will be to declare that he is married. I have very great doubts whether the plaintiff will be benefited by the result of that decree, but according to the best conclusion I can come to, I think I must find there was such a transaction took place as amounted to a valid marriage.

Judgment.

There is the common consent of all these parties that the defendant was unwilling up to the fifth or sixth of July. He was unwilling to marry, and I think it may be admitted on all sides, also, that there was a sort of conspiracy among these parties to procure him to do what he ought to have done. It was a conspiracy not to do anything wrong, but to compel defendant to do something that he ought to have done, and the only question is, whether the acts of the conspirators were carried so far as to deprive the defendant entirely of all sense and volition; or if they only went far enough to indicate a will to carry out the wish of the plaintiff and induce the defendant to be married.

Well, the defendant produces the evidence of *Carroll* and the *Wilds* which seems to me very extraordinary. I cannot understand what reason *Carroll* or the *Wilds* could have had to do anything wrong or criminal for the purpose of getting the defendant to do something

1881.

Roblin
v.
Roblin.

right towards the plaintiff. It was no interest of theirs, and it is evident there would not be much loss incurred by their living there for some time, and the *Wilds* then would be conspiring to carry out an illegal arrangement, and there is no reason assigned for that.

It is not shewn that the plaintiff was bribing him, that she had done anything to induce him to come to that conclusion; and if we suppose that *Carroll* was influenced only by a friendly feeling towards the plaintiff, we can hardly imagine that he carried that friendly feeling so far as to induce him to do what was criminal and wrong for the purpose of carrying it into effect. And equally so and to a greater extent it seems to me impossible to suppose that the Justice of the Peace, Mr. *Blair*, was going to prostitute the functions of his office for the purpose of benefiting the plaintiff. There is no suggestion that he was bribed by them; no suggestion that there was any reason for his doing anything out of the ordinary course, and it leaves it in a state of great doubt what reliance ought to be placed upon the evidence of these parties which would appear to lead to a conclusion of that kind.

Judgment.

We have not had the advantage of having *Carroll* and the *Wilds* examined personally here, and I do not know how their evidence might have been modified by such examination; but at present I do not feel inclined to place implicit reliance upon it, and I consider it to be modified considerably by the evidence of the defendant himself.

Mr. *Blair's* evidence does not go the length of saying that the defendant was so intoxicated as to be unable to understand what he was about. He said he was not too drunk to get married, supposing he was drunk at all. Now a man may be drunk and yet have sense enough to make a binding contract, and the utmost that could be said of it would be, that it would be a voidable contract, one that he might avoid by proceedings or resist the attempt to enforce, but still a contract that could be ratified and confirmed.

1881.

Roblin
v.
Roblin.

Then the defendant and plaintiff went to the Justice of the Peace themselves.

The constable and *Carroll* certainly did not go into the office. They allowed these two to go into the office, and we have just heard Mr. *Blair's* evidence stating what took place, that he asked all the customary questions as to their places of residence, and as to their intention of getting married and so on, and that he united them according to the laws of the State. They then came out.

Now it is hardly possible to conceive that there could be such a state of intoxication, and such a complete annihilation of will on the part of the defendant, that he could have gone into the Justice's office; that he could have answered all these questions; that he could have authorized the Justice to marry him, and have made the necessary responses to the marriage ceremony, and then come out and go to *Carroll's* house, and all without knowing what he was about. It is

Judgment.

incredible to me. I do not believe it.

Then there is some discrepancy in the evidence as to what took place at *Carroll's* that night. The plaintiff tells us they slept together there. I don't know that it is essential to the merits of the case to determine that one way or the other, but merely as a question of evidence it is useful to consider it.

The defendant says it was not so at all, and that he cannot tell from his own recollection what took place, but he brings others to prove admissions of the plaintiff that he had not slept with her, but he had lain on the bed with his clothes on all night in a state of intoxication; but I find the defendant himself gave a different account of it, when previously examined, and I cannot accept the explanation that has been given that he was only relating what had been told to him by others.

There is no such qualification in his depositions, and he tells us there that he slept in the same bed with the plaintiff that night.

1881.

Roblin
v.
Roblin.

In another place he says, I stayed in bed with her, but didn't sleep much, if at all. Now that is certainly as being from his own recollection, and instead of being in such a state of intoxication that he didn't know what he was about, he even says he didn't sleep much. Well I feel inclined to place more reliance in that case upon the positive evidence of the plaintiff, as to what took place, than upon the evidence of those witnesses who now swear at the distance of eighteen years, to a remark made by plaintiff in the morning.

It may be the plaintiff is mistaken as to his breakfasting there in the morning. I don't know how that is, but she does not state very positively that he did breakfast there—that is her impression, she says.

I don't know how she stated it before, but on her examination before me she says her impression is, that he did breakfast there.

I might remark, however, that it is a very extraordinary thing that the defendant left plaintiff immediately the following day; and remained away two years without returning to his home, and that since then he has never lived with the plaintiff at all. It may be that he was conscious of having been entrapped into the marriage, but it was still such a device that left him bound, in my opinion.

Well, we now trace the matter a little further. In 1866 an action was brought against the defendant, and the object of bringing that action was not for the purpose of getting the paltry sum of \$100, which seems to have been recovered, for the expense of the funeral of the child or the plaintiff's maintenance. But it was brought expressly for the purpose of establishing the validity of the marriage. It was brought by the plaintiff's brother for the purpose.

The counsel for the plaintiff put it in such a shape as to raise that question, and was prepared to discuss it at that trial. We find that it was not tried at all—that a settlement was come to, and that in that settle-

Judgment.

1881. *ment the defendant acknowledges, fully and clearly and unequivocally the existence and validity of the marriage. It is said there was some collateral agreement which was the consideration for that. I can hardly believe Mr. Walbridge, who was the counsel for the defendant, would have consented to any such settlement of the suit at all, if there had been no marriage. That the defendant was aware of the circumstances at that time must be clear, I think, and according to my present view of what he knew at the time I must take it that he knew then all that he now knows, and that the defence was put in with the hope probably that the plaintiff would not be able to get evidence for the purpose of establishing the marriage; and I am therefore inclined to place reliance on Mr. Thrasher's evidence, who tells us that the defendant, when he saw the witnesses arrive for the purpose of the trial, acknowledged that he was "beat," and then a settlement took place.*

Judgment. That settlement is to my mind the strongest confirmation of a marriage having been effected before the Justice of the Peace.

Mr. *Walbridge*, it is true, has a vague sort of recollection in the matter that something was talked over, and so has Mr. *Bell*. Mr. *Bell*, is quite clear that no agreement as to anything else was come to, or it would have been put in the agreement indorsed on the record, and in that I think we will all agree with him, and that no counsel would have permitted any such agreement to have remained on a separate piece of paper or in the uncertain memory of witnesses if it was really a part of the settlement that was come to.

I think it is unnecessary to trace the matter any further. The defendant is quite willing to receive the plaintiff if she is found to be his wife. There is no such conduct alleged against him as would render it improper for her to live with him. She does not apprehend any difficulty in doing so, and I do not see that

the decree can be in any other shape than that adopted in *McKay v. McKay* (a); that is declaring the parties man and wife and dismissing the bill, upon defendant undertaking to maintain the plaintiff.

Costs to plaintiff between solicitor and client.

1881.

Roblin
v.
Roblin.

NELLES V. THE BANK OF MONTREAL.

Insolvency—Preferential transfer—Bond fide advance to carry on business.

K., a trader, had a line of discount with the defendants to the extent \$20,000, and had gradually increased his discounts so that his indebtedness to the bank reached \$40,000, when an arrangement was made that he should deposit notes and other securities as a means of further indemnifying the bank. In consequence thereof the bank continued to make further advances to K., and he assigned sundry notes and bills to the bank, the last of such transactions having been carried out only two or three days before his being placed in insolvency, the agent of the bank, as he swore, having been in entire ignorance of the true state of his K.'s circumstances, caused by his reliance on the statements of the Mercantile Agency, and the plausibility of K.'s manner.

Held, that the transactions could not be viewed as having taken place in contemplation of insolvency, but were *bond fide* attempts on the part of the bank to enable K. to avoid insolvency proceedings, and carry on his business.

The bill stated that on the 27th of April, 1877, the plaintiff had been appointed the assignee of the insolvent estate of one *Marvin Knowlton*. That on the 3rd of March previously the defendants had received a draft by the insolvent for \$1,500 on *William Fawcett*, which draft was afterwards paid by *Fa*. On the 16th of March a draft for \$1,200, accepted by *Thomas Fawcett* and paid by him. On the 17th of the same month another draft for \$400, accepted by the same *Thomas Fawcett*, and also paid by him. On the 31st another draft for \$1,700, also accepted and paid by *Thomas Fawcett*, and on the 11th of April a draft was

1881. accepted by *Thomas Fawcett* and also paid by him. On the 21st of April the insolvent absconded, and on the 24th of April the defendants received on account of their claim against *Knowlton*, \$1,000, the defendants at this time, knowing or having probable cause to suspect the fact of *Knowlton* being insolvent.

Nelles
v.
Bank of
Montreal.

The answer of the defendants set up that long prior to the 3rd of March, 1877, *Knowlton* kept a current account at the defendants' bank, and at that time owed them \$40,000 on promissory notes and bills of exchange, either due or maturing, and that an arrangement was then arrived at that *Knowlton* should deposit notes and other securities as collateral or further indemnity of the bank. That for three or four months previously the debits of *Knowlton* largely increased, and the agent of the bank urged the fulfilment of the promise to deposit securities, and in accordance with the promise made by him to *Knowlton*, and in the ordinary course of business, *Knowlton* indorsed these notes, and the defendants continued to renew and make fresh advances; and if such collaterals had not been deposited the defendants would have insisted on payment.

Statement.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at London, in the autumn of 1880.

Mr. *Boyd*, Q. C., for the plaintiff.

Mr. *Moss* and Mr. *Street*, for the defendants. The only point discussed was, whether the payments and transfers of securities to the bank so short a time before the actual placing of *Knowlton* in insolvency, were not to be looked upon as made by way of preference, and therefore void under the Insolvent Act.

Feb. 17th. BLAKE, V. C.—I have gone several times over the

evidence in this case. I remain of the opinion I formed at the hearing, of the *Fawcett* transaction standing alone. Taking that matter by itself I should have concluded that the true story was told by *Tracy* in his examination previous to the hearing. I was not at all favorably impressed with the way he gave his evidence before me, and was not satisfied with the reasons assigned for the variance in the statements made by him on the two occasions. Looking at the accounts given of this transaction alone, I should have come to the conclusion that the agent of the Bank, desiring further security, was offered a yard receipt; that the agent of the Bank being informed that it was not safe to take this, under the circumstances, then formed with *Fawcett* the plan whereby the Bank was to get the proceeds of the lumber; that this was carried out as a safer plan, in view of the position of *Knowlton*, than the taking a security on his lumber, which was not then entirely paid for. The evidence of *Knowlton*, the story of *Tracy* as first told, the secrecy to be observed as to some of the matters that passed at this interview, as admitted in the evidence of *Fawcett* and *Despard*, all tend to this conclusion. Nor is this dispelled in my mind by the production of the letter written by *Fawcett*, as it appears to me to be but a fitting close to such an arrangement, and prepared to give colour to the transaction.* But, while

1881.

Nelles
v.
Bank of
Montreal.

Judgment.

"THOMAS FAWCETT.

FAWCETT'S BANK,

"M. KNOWLTON, Esq., London.

WATFORD, ONT., March 1st, 1877.

"DEAR SIR,—I would take the eight hundred thousand feet of lumber we were talking about last night, on commission, you to pay me fifty cents (50c.) per thousand feet for selling the same, and I would allow you to draw on me at eight (8) dollars per thousand feet at three (3) months' time after lumber was delivered here. I would pay freight and charge you 8 per cent. per annum for amount. It must be distinctly understood that the good lumber and picking are to be left in the lumber sent here, and I will have it sold to the best advantage, you at all times receiving monthly or weekly instalments as may be desired. If this proposition is accepted by you please let me know and ship at once.

"Yours truly,

"THOS. FAWCETT."

1881. feeling this strongly, as the conclusion from this part of the dealings as it stands isolated, it is necessary to look at the surrounding circumstances to see what preceded and what followed this bargain. The insolvent had opened a line of discount with the Bank of Montreal to the extent of \$20,000. This had been from time to time increased with a not very defined agreement that, as the discounts increased, securities should be given to answer the fresh advances. The line of discounts increased until the 15th of September, 1876, when they reached \$25,981—on 30th of September, \$27,232—on the 15th of November \$30,984—on the 16th of December \$39,713—on the 30th of December \$41,611—on the 28th of February, 1877, \$42,373—and on the 31st of March, 1877, \$47,321.

Before the transfers or discounts brought in question in this suit, the Bank of Montreal had securities sufficient to answer the whole of the indebtedness of the insolvent. The notes, the transfer of which is impeached, were handed over in March, and during this month the discounts increased from \$42,373 to \$47,321, so that the account of the insolvent was not diminished by this transaction. The Bank of Montreal's manager at London says: "In the month of March, 1877, I discounted \$23,188.31; of that amount it appears that \$12,098 were renewals; and fresh discounts \$11,089.30; the month of April, I appear to have discounted about \$10,000, or I mean \$10,965 in April, and of that amount there were fresh discounts for \$4,973.77, the balance was for renewals. I discounted up to the 26th of April for Mr. *Knowlton*." I think I must qualify the conclusion at which otherwise I should have arrived by these surrounding circumstances, and conclude that, as a matter of fact, *Despard* placed so much reliance on the statements of the Mercantile Agency and of *Knowlton*, and was led away so much by the plausibility of the insolvent, that he did not know or think that *Knowlton* was insol-

Nelson
v.
Bank of
Montreal.

Judgment.

vent until the 26th of April, the day before the attachment issued, and after the whole of the transactions impeached had taken place. There is no doubt there is more evidence in this case than was adduced in *Nelles v. Paul* (a), to shew the true position of *Knowlton* and the knowledge of his standing, but the remarks there made are worthy of notice, as shewing how completely the insolvent succeeded, according to the view of the Court there, in blinding himself and misleading others. "Until the last moment he appears to have been able to obtain credit, and so far as we can judge to have worn the garb of prosperity. No one proves that there was a whisper even among the mercantile community breathing upon his solvency." I conclude upon the whole of the evidence that what was done was not in contemplation of insolvency, but was an attempt made in good faith to avoid it, and to enable *Knowlton* to carry on his business. As to the last \$1,000 I think it was to answer a mere temporary advance of \$1,000 made on the distinct understanding that, at once it was to be replaced.

1881.

*Nelles
v.
Bank of
Montreal.*

Judgment.

I have endeavoured to apply the cases of *Smith v. Hutchinson* (b), *Nelles v. Paul* (c), *Suter v Merchants' Bank* (d), *Davidson v. Ross* (e), *Davidson v. McInnes* (f), to the facts proved in this case, and doing so, I cannot find that the transactions have been successfully impeached.

I therefore dismiss the bill, with costs.

(a) 4 App, 5.

(c) 4 App. 1.

(e) 24 Gr. 22.

(b) 2 App 405.

(d) 25 Gr. 365.

(f) 24 Gr. 214.

1881.

CHAMBERLAIN V. CLARK.

*Mortgagor and mortgagee—Statute of limitations—Payment of interest
Possession of strangers.*

The possession of a stranger which has not ripened into a title as against the owner of land, will not enure to the benefit of him so in possession as against the mortgagee, so long as his interest is regularly paid by the owner.

This was a bill filed by *Chamberlain*, against *Adam* and *Robert Clark*, executors and devisees in trust of *William Clark* a deceased mortgagor, *Elizabeth Clark*, his widow, and *William Clark* a son, who was in possession of the land in question.

The defendant *William Clark* answered, claiming title in himself under the Statute of Limitations, alleging his possession since 1865, of the east half of the land, and the possession of one *John James*, from 1865 to 1872, and his own subsequent possession of the west half, and no knowledge of plaintiff's mortgage till after 1877.

The bill was taken *pro confesso* against the defendant *Elizabeth Clark*. The defendants *Adam* and *Robert Clark* answered submitting their rights to the

Statement.

The plaintiff's mortgage, which was to secure \$1,319 and interest, was dated 10th February, 1877, and was immediately registered.

The plaintiff amended his bill, setting out that the deceased in 1863 had mortgaged the land in question to one *Black*, to secure \$700, whereof the defendant *William Clark* had full notice by registration and otherwise, before his taking possession in 1865; that payments of interest were duly made on this mortgage to *Black* from time to time by the deceased, and that payment of the principal was extended by *Black* down to 1873, at which period the plaintiff, at the request of the deceased, paid this mortgage and obtained an assignment of it: that this \$700 formed part of the \$1,319.

The bill prayed (1) payment of the mortgage, (2) in 1881, default sale, (3) in the event of deficiency, administration of the deceased mortgagor's estate, (4) *fi. fas.* against the executors for the amount due plaintiff, (5) an order for immediate possession.

Chamberlain
v.
Clark.

No answer was filed to the amended bill.

The cause was heard at the spring sittings of 1880, at Peterborough.

Mr. *Boyd*, Q. C., and Mr. *H. H. Smith*, for the plaintiff.

Mr. *Moss*, for defendant *William Clark*.

Mr. *N. D. Beck*, for defendants *Adam* and *Robert Clark* the executors joined with the plaintiff in asking an administration but submitted that in the event of administration being directed, execution would not be awarded.

The following authorities were referred to: *Doe v. Eyre* (a), *Doe v. Walker* (b). The Registry Act, secs. 74, 78, 81. Dart. V. and P. 5th Ed, 402. R. S. O. ch. 108, secs. 22-23.

SPRAGGE, C.—The plaintiff filed his bill as mortgagee, by mortgage of *William Clark*, the father of the defendant *William Clark*, of the south half of lot 3, 7th concession Seymour. The defendant *William* sets up possession in himself of the east 50 acres since 1865, and possession in one *James* from the same date, until his death in 1872, of the west 50 acres, and possession since that date of the whole, and claims that the plaintiff is barred by the Statute of Limitations.

Sept. 1st,
1880.

Judgment.

At the hearing I thought it clear upon the evidence that there was nothing to bar the right of the plaintiff as to the west 50 acres.

(a) 17 Q. B. 368.

(b) *Ib.* 373.

1881.
 Chamberlain
 v.
 Clark.

The plaintiff, by his amended bill, filed 30th January, 1880, in addition to claiming under the mortgage, under which he claimed in his original bill, (and to which it is not necessary to refer further) claimed under a mortgage of the same land made by the same mortgagor in the year 1863, to one *Black*, and on which mortgage payments of interest were made as appears by the evidence of Mr. *Dennistoun*, up to a date within ten years of the filing of the amended bill, and Mr. *Dennistoun* says that the time for payment was extended up to February, 1871, provided interest should be punctually paid on 1st August, 1870. The mortgage contained the usual covenant for quiet enjoyment until default.

The statement put in by Mr. *Dennistoun*, and verified by him, shews payments of interest by the mortgagor *Clark*, up to 1873, the last payment having been made on 11th February, of that year. The mortgage to *Black* was assigned to the plaintiff 1st March, 1873.

Judgment. This prevents the running, in favor of the mortgagor or of the defendant of the Statute of Limitations, under the Real Property Limitation Act of 1874. I had occasion to consider the point in the case of *Hooker v. Morrison* (a), in which I gave a judgment at some length, which I have handed to the reporter of this Court. My conclusion is, that the defence of the Statute of Limitations fails.

The mortgagor is dead. The defendants *Adam* and *Robert Clark* are his executors. The widow is made a defendant as entitled to redeem as dowress, and *William Clark* the son is in possession. Both mortgages contain covenants by the mortgagor for payment of mortgage money. The bill prays a sale; for order for delivery of possession; and for administration of the estate in the event of there being a deficiency upon sale, in that event coming into Court on behalf of himself and all other creditors of the deceased mortgagor.

(a) Ante p. 369.

The plaintiff is entitled to the relief prayed for by him. 1881.

Chamberlain
v.
Clark.

I cannot in my opinion in this suit make any order as between the executors and the defendant *William Clark*. Mr. *Beck*, for the executors, asked for an order over against him in case, as I understood, I should hold him entitled to retain the east 50 acres as against the mortgagee. I hold him not so entitled. Nor can I in this suit make any order as between the plaintiff and *William Clark*, except as to possession. None is asked, nor are the pleadings framed for any order. The decree may be expressed to be without prejudice to any application that may be made by any party in the event of the mortgaged premises being redeemed.

Judgment.

IN RE ALEXANDER GRANT, A LUNATIC.

Execution creditors—Proving claim against estate of lunatic.

The common law right as to the priority of an execution creditor of a lunatic, who has an execution in the hands of the sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ.

Motion for injunction under the circumstances stated in the judgment.

Mr. *W. Cassels*, for the committee of the lunatic.

Mr. *Moss*, contra.

SPRAGGE, C.—This was an application by the Committee of a Lunatic for an injunction to restrain creditors, who had obtained a judgment and had execution in the hands of the sheriff before the lunatic was declared to be so, from proceeding at law for the recovery of their debt.

Nov. 11th,
1880.

1881. The ground of application was that by Statute 9 Vict. ch. 10, R. S. O. ch. 40 sec. 67, the estate of a lunatic is placed in the same position as the estate of an intestate.

Re Grant.

The statute does not touch the personalty of a lunatic. The question is as to his real estate.

The Act is framed upon the Imperial Acts 43 Geo. III. ch. 75, 9 Geo. IV. ch. 78, and 11 Geo. IV. and 1 Wm. IV. ch. 65, or rather upon the latter, the former Acts having been thereby repealed.

The chief difference between the provisions of those Acts and our own Act is as to how the real estate is to be dealt with by the Court. Under the Imperial Acts the proceeds of sale, mortgages, &c., were to be applied in such manner as the Lord Chancellor should direct. Under our Act the direction is, that all debts shall be paid ratably without any preference to such as are secured by sealed instruments.

Judgment

Our Act, 9 Vict., recites in the preamble that doubts had arisen as to the proper construction of that part of our Chancery Act of 1837, which relates to matters in lunacy, "and that it was expedient to remove such doubts, and to provide for the better management and care of lunatics," and for the preservation of their estates from waste and destruction, and to provide more effectually for the disposal of their estates for payment of debts, and for the support of such persons (lunatics and idiots), maintenance of their families and education of their children.

Mr. Cassels refers me to *Taylor v. Brodie* (a), which followed *Bank of British North America v. Mallory* (b), *Doner v. Ross* (c), and *Parsons v. Gooding* (d). All these cases were under the Property and Trusts Act 29, Vict. ch. 28, the 28th section of which

(a) 21 Gr. 607.
(c) 19 Gr. 229.

(b) 17 Gr. 102.
(d) 33 U. C. R. 499.

enacts, that in case of a deficiency of assets, debts should be paid *pari passu* and without any preference or priority of debts, of one rank or nature over those of another; adding, however, that nothing therein contained should prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate. This proviso is not in our Lunacy Estate Acts, the only preference therein mentioned however as not to prevail, is that of sealed instruments, and I apprehend that charges and liens upon the estate of a lunatic existing at the time of his being by any process or proceeding found or declared lunatic, are not affected by the provisions of the Act.

1881.
Re Grant.

In the cases to which I have referred the actions were against the personal representatives, and the creditors had not, at the date of the death of the deceased, any lien or charge upon his estate—the estate thus coming to the hands of the personal representatives subject to debts so far as those creditors were concerned, which he was entitled to pay and bound only to pay *pari passu*, and the creditors were bound to accept payment in that way. It has not, I believe, been held in any case that a creditor who had at the date of the death of his debtor an execution against the goods or lands of his debtor was bound to accept payment ratably with the creditors enumerated in the Act, and I apprehend it could not be so determined inasmuch as such creditor would not fall within the category of any of the class of creditors enumerated; and while such a person is a judgment creditor he is more than a judgment creditor, being a creditor who has a charge if not strictly a lien, upon the estate of his deceased debtor.

Under the Lunacy Estate Act, we have language somewhat different, and it provides for ratable distribution only in respect of real estate, and under an order made for that purpose by the Court, and where the personal estate is not sufficient for the discharge of the debts.

Judgment.

1881.
Re Grant.

In the first place then, there is nothing in the Act to interfere with the priority obtained by the creditor by his execution against the personal estate. Then as to the lands, these creditors by their executions had a charge upon the lands before they came to the hands of the committee (coming to his hands only for the receipt of rents and profits), and before any adjudication of lunacy; and this is a case, as I read the statute, not within its provision.

I find no instance of an injunction having been issued in England, under the Imperial Acts to restrain a creditor from enforcing his debt against a lunatic by the ordinary legal process, but indications in several cases of lunacy that the ordinary process is not interfered with by injunction. One reason certainly may be that the disposition of the proceeds of sale are in the discretion of the Chancellor.

Judgment. With us there is less reason for objecting to interfere because a more definite relief is given to the creditor by our statute. Still, although the statute has been in force for thirty-four years there has been, I believe, no instance of the Court interfering with the legal right of the creditor. Occasions have arisen in several cases of lunacy in this Court where it may be assumed that the Court would have so interfered, or at least have been asked to interfere, if it had been conceived that such interference was warranted by the Act. I think it has always been assumed that an adjudication in lunacy, did not affect the common law right of the creditors. It was so assumed in the matter of *Shaw*, a lunatic (a), the only suggestion having been, that creditors who had come in under an order and proved their debts may have lost their remedy at law. It was assumed that but for that they would have had their remedy by ordinary legal process.

For these reasons I am of opinion that, as the law

(a) 14 Gr. 524.

stands, I cannot interfere in this case by injunction. 1881.

Re Grant.

The creditors against whom the application is made, are entitled to their costs of resisting it.

The petition is framed only for the case of particular creditors, but it will be well to turn it into a general application under the statute, if the committee should be of opinion that it will be for the benefit of the lunatic's estate. Judgment.

This application by the committee is unsuccessful, but it was made in good faith for the benefit of the estate, and the costs of it may properly be allowed to him.

HATHAWAY V. DOIG.

Injunction—Practice—Irreparable damage—Restraining nuisance—Public nuisance.

Although a man may be engaged in a perfectly legitimate trade or calling, he will not be permitted to carry on the same in such a manner as to cause a nuisance or unreasonable inconvenience to his neighbours, and in order to obtain an interlocutory injunction to restrain him so doing, it is not necessary for the plaintiff to shew that the damage is irreparable. Therefore, where a man was engaged for some time in a thickly inhabited part of the City of Toronto, in the manufacture of gas receivers and was in the month of Feb., 1881, engaged in contracts for the manufacture of vessels which required the joining together of boiler plates by riveting, which created so great a noise as to render the occupation of the plaintiff's house, distant only about fifteen feet from the factory, difficult, and whereby the wife of the plaintiff, who was the owner of the house, was kept in a nervous state of health, and a bill was filed in April, the Court [PROUDFOOT, V. C.], upon an interlocutory application, restrained the defendant from "continuing his works so that the noise cause a nuisance to the plaintiff." The fact that the nuisance, if a nuisance at all, was alleged to be a public one, and should be moved against by the Attorney-General, formed no ground for refusing relief to the plaintiff, although the property in respect of which the injury was sustained was the property of the wife of the plaintiff, not his own.*

* On the 17th of June the Court of Appeal reversed the order, on the ground of want of interest in the husband.

1881.
Hathaway
v.
Doig.

This was a bill filed 25th April, 1881, by *James Hathaway* against *Alexander Doig*, setting forth that the plaintiff was the owner of, and for several years had resided in a house on Nelson street, in the city of Toronto, and that the defendant had a steam engine and machine factory within fifteen feet of plaintiff's residence. The bill further stated that the defendant had recently commenced to carry on the business of boiler making, and his works were driven by a steam engine, the smoke from which caused great annoyance and inconvenience to the plaintiff; and that in carrying on the business of boiler making the defendant caused great noises to be made so that it was almost impossible with any degree of comfort to continue the occupation of plaintiff's house, such noises being caused by the riveting together of sheets of iron out of which the boilers were constructed, and that such noises continued with very little intermission from seven in the morning until six in the evening, and thereby the value of the plaintiff's property was greatly depreciated, and unless the noises were abated the plaintiff would be compelled to give up his residence in said house; as the effects upon the plaintiff's wife were such as to injure very materially her health.*

Statement.

The bill also alleged applications by the plaintiff to the defendant to desist from causing such noises but which the defendant refused to do, insisting on his legal right to carry on such works and in doing so to continue the noises complained of.

The prayer of the bill was that such smoke and noises might be declared to be nuisances; and that the

*A letter was put in evidence written by the Medical attendant of Mrs. Hathaway which stated * * "It is my opinion that the continued daily listening to the sounds of hammering by the boiler makers, in the vicinity of your house, is a principal cause of your wife's illness and, if it cannot be abated, I advise you to change your residence to a quiet neighborhood when she may recover from her nervous state."

defendant might be restrained from continuing the same and for further and other relief. 1881.

The plaintiff moved upon notice for an interim injunction. In support of the application the plaintiff filed several affidavits substantiating the material statements of the bill; and the defendant filed a large number of affidavits by persons residing in the vicinity of the works stating that they did not suffer any inconvenience from the manner in which defendant carried on his works. It was shewn that the manufacture of the vessels complained of began as far back as February, 1881.

The plaintiff in his cross-examination on his affidavit filed on the motion stated: "This property is lot 53 on the south side of Nelson street; it belongs to my wife * * * my wife is paying for the property by instalments."

Mr. E. Blake, Q. C., Mr. Moss, and Mr. W. Barwick, in support of the motion. No doubt can exist in the minds of any persons who read the affidavits produced that it is incontrovertibly established that the effect of the noises spoken of in the bill are such as to materially interfere with the plaintiff's enjoyment of his property; and also that the health of the plaintiff's wife has been injuriously affected by them and the case is shewn to be so pressing in its nature as to justify and call for the immediate exercise of the discretion of the Court by granting the injunction prayed for. Argument.

Cartwright v. Gray (a), Winterbottom v. Lord Derby (b), The Attorney General v. The Sheffield Gas Co. (c), Ball v. Ray (d), Tiffing v. St. Helen's Smelting Co. (e).

Mr. McCarthy, Q. C., and Mr. J. H. Ferguson, contra.

(a) 12 Gr. 399.

(b) L. R. 2 Ex. 316.

(c) 3 D. M. & G. 304.

(d) L. R. 8. Chy. 467.

(e) L. R. 1 Ch. 66.

1881. The weight of evidence is against the existence of any such nuisance as that complained of or at all events to such an extent as to justify the Court in interfering before the hearing of the cause.

Hathaway
v.
Doig.

St. Helen's Smelting Co. v. Tiffing (a), shews clearly that the mere fact of the defendant making or causing the noise complained of in the carrying on of a legitimate calling is not sufficient to induce the Court to assume that the defendant is guilty of the nuisance complained of.

An interlocutory injunction will only be granted in cases of great urgency, which has not been shewn to exist here; up to the present time the liability of the defendant in respect of the acts complained of has not been determined. In short the plaintiff in no sense shews that there exists any danger of irreparable injury from the continuance of the so called nuisance up to the final hearing of the cause: and so far as convenience or inconvenience is concerned the evidence shews clearly that the balance is in favour of refusing the interlocutory application. Besides if what is complained of be a nuisance at all it is decidedly a public nuisance; and the plaintiff does not shew that he thereby sustains such special damage or so peculiar an injury as will entitle him to file a bill for relief in respect thereof.

Argument.

Counsel also contended that the plaintiff by lying by from the time the defendant first began to work at these boilers had disentitled himself to any relief; or at all events to any relief before the hearing: and further that the bill appeared to have been filed by the plaintiff, not for his own benefit but to try a right in the interest of other parties and in which the plaintiff had not a substantial interest: *McLaren v. Caldwell* (b), *Elwes v. Payne* (c), *Soltan v. DeHeld* (d),

(a) 11 H. L. Ca. 642.

(c) L. R. 12 Ch. D. 468.

(b) 5 App.R. 363.

(d) 2 Sim. N. S. 142.

Gordon v. The Cheltenham Railway Co. (a), Pentney v. The Lynn Paving Commissioners (b). 1881.

Hathaway
v.
Doig.

They also submitted that as the cross-examination of the plaintiff shewed that he had not any beneficial interest in the property in which he was residing the suit should have been instituted in the name of the wife, whom he states was the person beneficially entitled.

PROUDFOOT, V.C.—In this case, which I understand May 16th. is a test case, I hasten to dispose of the motion for an injunction, so that the party dissatisfied may bring it speedily before a higher Court.

The principal question, and that to which my attention has chiefly been directed, is whether the defendant, in operating his factory, causes so much noise and disturbance as to be a nuisance to the plaintiff, and whether he ought to be restrained from continuing it by an interlocutory injunction.

The defendant is the proprietor of a factory in which, for some years, he has been engaged in making vessels for use in gas works. In February, last, he engaged in some contracts requiring the junction of boiler plates by riveting, and he has on hand several contracts of that description. Judgment.

The operation of riveting these plates is a noisy one, and a great number of affidavits have been filed on both sides as to the amount of noise, and whether it is such as to cause a nuisance.

The plaintiff's residence is across a lane, and only fifteen feet distant from the defendant's factory. The lot belongs to the plaintiff's wife, and was purchased about three years ago.

The bill was filed on the 25th April, and when the motion for the injunction came on some days since, the plaintiff offered to have it turned into a motion for a decree, which the defendant declined.

(a) 5 Beav. 233.

(b) 15 ... R. 983.

1881.
Hathaway
v.
Dolg.

The defendant contends that upon an application for an interlocutory injunction the plaintiff must make out a case of irreparable injury; that evidence enough at the hearing of a cause to warrant an injunction will not suffice for an interlocutory order. It is quite true that for such an order there must be more pressing necessity than for a decree at the hearing; but that the injury must be irreparable, in the strict sense of that word, is not accurate. It is only required to be a material injury; that it is necessary for the protection of property, or the prevention of some threatened injury thereto requiring the application of a speedy remedy.

Judgment.

The defendant also says that the delay from February to April is such as to disentitle the plaintiff to an injunction, since, if he had filed the bill in February, the case might in due course have been brought to a hearing at the sittings just closed, while now, as the defendant insists upon taking all the time for the several proceedings preparatory to a hearing allowed by the rules of Court, it cannot be brought to a hearing till the autumn. I do not think the delay so great as to prove acquiescence on the part of the plaintiff in the existence and continuance of the nuisance, and the plaintiff swears that the annoyance was greatest in the beginning of April. The plaintiff's offer to have the case heard at once also deprives the objection of much of the weight it otherwise might have.

It is also argued that the nuisance, if a nuisance at all, is a public one, and that the Attorney-General is the proper person to sue, unless there be a private injury inflicted on the property of the plaintiff, and that in this case, the property being the wife's, the plaintiff suffers no wrong.

It is sometimes difficult to decide whether the nuisance is to be considered a public or a private one, and there are cases in which the matter complained of may only be a nuisance to the persons owning property in the immediate vicinity, and be no nuisance at all, nay, may

afford pleasure, to those at a distance. A peal of bells for instance. But even if a public nuisance, a private individual may have an injunction in regard to particular damage sustained by him. It is not necessary that the person should own the property; it suffices that he be the possessor or occupant of it. A tenant from year to year, or even a weekly tenant, has been held entitled to the protection of an injunction. In this instance the plaintiff is neither owner nor tenant. He is the husband of the owner, and he and his wife reside on the place. Assuming that he has no legal title in the property, he has the right to live with his wife, and I think it has been held that she cannot eject him: *McGuire v. McGuire* (a); and an interest of this kind, I think, is enough to entitle him to have it protected. If his possession be injuriously affected, if he suffers personal inconvenience and discomfort, if his health is impaired, and if his wife become ill through the noises caused by the defendant's works, although she might have a separate remedy, it seems to me that he suffers that sort of damage, that sort of wrong, intended to be prevented by means of an injunction.

1881.

Hathaway
v.
Doig.

Judgment.

To obtain an interlocutory injunction it need not, and indeed cannot before the hearing, be irrefragably established that the plaintiff is entitled to relief; all that is required is to shew a *prima facie* case of real or apprehended injury. And in ascertaining if the matter complained of be a nuisance or not, it is proper to consider that a man living in town "must submit himself to the consequences of those obligations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. * * Everything must be looked at from a reasonable point of view; therefore the law does not regard

(a) 23 C. P. 123, 125.

1881. *Hathaway v. Doig.* treading and small inconveniences, but only regards sensible inconveniences—injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected.”

The evidence in this case is, as might be expected, of a very conflicting character in many particulars. Those who live nearest to the defendant's factory, especially those who have no wall or house intervening between them and it, speak uniformly of the annoying and disagreeable noise produced by the hammering of the boiler plates, and agree in thinking that the plaintiff must suffer much more from it than they do. One gentleman, whose house is about 150 feet from the factory, is unable to study in his library since his double windows have been removed. Another at as great a distance, or rather more, is unable to converse in his drawing-room with another person without inconvenience, and other witnesses prove suffering in health from the noise. The noise is spoken of as almost unbearable. The plaintiff swears to the same effect; that his wife is seriously affected by the noise, and has been made ill by it. And this is sworn also by the physician who attends her. The defendant himself says the business is a noisy one.

Judgment.

On the other hand, there are many affidavits from persons in the vicinity who say they have not suffered from the noise. Some of them are near the factory, but with the plaintiff's house between them and it; others are at somewhat greater distances, generally, however, with buildings or obstructions of some kind between them and the factory.

The inquiry, of course, is not whether it is a nuisance to the neighbours, but if it is one to the plaintiff, and the evidence of these witnesses is used for and against the noise being a nuisance to him. There is no question but that the work is noisy; and to the plaintiff, only fifteen feet from it, it must be much more annoying than to others at a greater distance. The result of the

evidence, I think, shews that it is a nuisance to the plaintiff and "sensibly diminishes the comfort and enjoyment of the property." There is also evidence that it diminishes the value of the property.

It is said, moreover, that "the balance of convenience" is against interference upon an interlocutory application. That it is of much less importance; that it is more convenient, for the plaintiff to leave his home to secure the comfort, peace, and health of himself and his wife, than for the defendant to abandon his works. I am not aware that the balance of convenience has ever been pushed so far as to drive a man from his home. Loss of health is one of the kinds of irreparable injury that the Court interferes to prevent: *Story*, Eq. Jur. sec. 926; but it would not so interfere if it were proper to tell the applicant he could leave his house and escape the danger. The object of the Court is to protect persons in the enjoyment of their property, not to drive them from it, although it may be very convenient and very profitable for the defendant to be enabled to continue his business.

1881.
Hathaway
v.
Doig.

Judgment.

But it does not seem to be a necessary alternative that one or other must leave his property or business. It seems that the defendant can conduct his operations so as not to cause these very injurious and disagreeable effects; and since the application for an injunction he has removed the process of riveting the plates to the lower story of his building, and thereby sensibly diminishing the noise; and by shutting, and keeping shut, the windows and doors of his factory it may be further lessened. The erection of buildings of a more solid and substantial character would still more effectually reduce it. It is no answer to say that the removal of the nuisance is a matter of difficulty; the defendant has chosen to run the risk of that. Nor is it any answer to shew that the place where the trade is carried on is a fit and convenient place for such a trade, and that the exercise of the trade there is only a reasonable use

1881. by the defendant of his own land. The spot may be very convenient for the defendant, or for the public at large, but very inconvenient for a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public from the exercise of a particular trade in a particular locality, and that some of the people in the vicinity do not object to it, can be no ground for depriving any individual of the right to enjoy his property without annoyance, discomfort, depreciation in value, and liability to injury to health.

Hathaway
v.
Doig.

It is also objected that the plaintiff is a person of little or no means, and that he is put forward by others to secure immunity for them, and that they have agreed to share the expenses. I think he has sufficient interest to ask for protection; and it is not the habit of this Court to permit a person to be oppressed and his rights to be infringed because he has the misfortune not to be rich. But the objection comes with a bad grace from the defendant, who is defending this suit not only for himself, but in the interest of other manufacturers who have formed a fund to assist him.

I think the defendant should be enjoined from continuing his works so that the noise cause a nuisance to the plaintiff.

WEBSTER ET AL V. LEYS ET AL.

1881.

Demurrer—Style of cause—Married woman—Administration suit.

In a bill the style of cause named several females as being severally wives of their respective husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs.

The bill shewed that the testator had appointed four executors, three of whom died, but stated that those so dying had never received any portion of the assets. In a suit for the administration of the estate, a demurrer *ore tenus* on the ground that the representatives of such deceased executors should be parties, was also overruled with costs.

The bill in this cause was filed by *Jane Webster, Mary Raymond, Victoria Tobin, Ida Maria Sive-wright, Bonaparte Earnest, William Henry Earnest and Francis Earnest*, against *John Leys, John Foster, Francis B. Leys, Catherine Sophia Defries, wife of Samuel Henry Defries, Catherine VanNorman, wife of James VanNorman, Peter Earnest, George Earnest, Susan Higginson, wife of William Higginson, Ann Jane Anderson, Hannah Klopp, wife of William Klopp, Mary Wilson, wife of Seth Wilson, and William Earnest*, setting forth that *John Earnest*, late of the City of Toronto, in the County of York, who died the 4th of August, 1856, made his last will bearing date the 14th of March, 1856, and thereby appointed the defendants *John Leys* and *John Foster*, his wife *Mary Earnest* and one *William Higgins* executors and executrix thereof, and that the testator at the time of his death was the owner of a large amount of real and personal estate in this Province.

Statement.

By the fourth clause of his will the testator provided as follows: "I desire my said first named executor to retain in his hands out of the moneys derived out of my said estate the sum of fifteen hundred pounds in money, the interest of which, ninety pounds currency per annum, he is to pay to my said wife during her

1881. life at any time during each year that she may desire the same—my said wife to have the right (in the event of her not marrying after my death) of willing the said sum of fifteen hundred pounds and the said chattel property left to her to whom she may please, provided always that in the event of her dying intestate, or in the event of her marrying again after my death the said sum of fifteen hundred pounds and the proceeds of the said chattel property shall at her death be divided, share and share alike among my heirs (my brothers' children.)”

Webster
et al.
v.
Leys et al.

The bill further stated that the testator's widow *Mary Earnest*, had intermarried with *William Higgins* named as an executor, and that they had since died; and that they, as well as the said *John Foster*, had never received any part of the testator's estate as executors, nor had they or either of them ever done other than formal acts in relation thereto; and that *Foster* had not even proved the will.

Statement.

The bill prayed, amongst other things, that an account of the testator's estate should be furnished by the defendant *John Leys*, who had alone acted in the affairs of the estate; and for a construction of the said fourth clause of the will; the plaintiffs alleging that they were advised that the said fourth clause of the will was of doubtful construction, and that it was doubtful who were entitled to the said sum of £1,500, and the proceeds of the chattel property referred to in the said fourth clause, in the events that had happened; whether the same belonged to the children of the testator's brother *George*, exclusively, or to the children of the testator's brothers, and that the said will was in other respects uncertain and doubtful in its meaning.

Some of the children of the testator's brothers who were alive at his death died before the widow.

The question was also argued, whether the shares in the £1,500 legacy vested at the date of the testator's death, when the widow married again, or at her death.

To this bill the defendant *Leys* demurred for want of parties. 1881.

Webster
et al.
v.
Leys et al.

Mr. *Moss* and Mr. *Kingsford*, in support of the demurrer.

Mr. *Boyd*, Q. C., and Mr. *Black*, contra.

The grounds of demurrer are clearly stated in the judgment.

PROUDFOOT, V.C.—Bill for administration of estate of *John Earnest*, to which a number of persons are made parties. The female defendants are named in the style of the cause as being severally wives of their respective husbands. March 10th.

The demurrer on the record is because the husbands are not parties. I do not think it necessary to consider the various arguments addressed to me as to the nature of the property,—of the estates of the wives, and of the interest of the husbands,—because I do not find any allegation in the bill that the daughters are married. The description in the style of the cause is only description, and is not a statement of a fact. The demurrer, informal in other respects, assumes the daughters to have been married, and if it were allowed would be giving effect practically to a speaking demurrer. It must be overruled. Judgment.

Another objection to the bill was made *ore tenus* that the testator having appointed four executors, three of whom are dead, the representatives of the deceased executors should be, but are not, made parties. But it is alleged in the bill that the deceased executors received no part of the testator's estate as executors, nor did other than formal acts in relation thereto.

The rule of pleading, as to parties, laid down in *Dan. C. P. 233*, is that the representatives of a
60—VOL. XXVIII GR.

1881. deceased executor are to be made parties where they have received assets for which they have not accounted with the survivor; but where that is not the case, and it is alleged that the deceased executor fully accounted with the survivor, and that nothing is due from his estate, the representatives need not be made parties. And that where the deceased executors never received assets it would, in all cases probably, prevent his representatives being proper parties. Whether it would do so in all cases or not, I do not know, but common sense and equity require me to say they are not necessary parties in this case. *Garrow v. McDonald* (a), Judgment. *Penney v. Watts* (b), do not decide anything contrary to this.

An objection was also discussed as to a defect of parties from the absence of some of those interested in the estate. But our General Order 58 allows a suit to be brought by one person interested; and even if the suit were to set aside a settlement only some of the persons beneficially interested need be parties.

The Court always has it in its power to see that no injury is done to any one from the absence of parties.

This demurrer also is overruled.

(a) 20 Gr. 122.

(b) 2 Ph. 149.

SAME CAUSE.

1881.

Webster
et al.
v.
Leys et al.

Will, construction of—Vested interest.

The testator gave £1,500 by his will to his widow, and in the event of her marrying again or dying intestate, this sum was at her death to be divided share and share alike among "my heirs (my brothers' children)." The widow did marry again, and a daughter of *W.*, a brother of the testator, died after the marriage but before the death of the widow, and so before the time for distribution.

Held, that the rule in such a case is, that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow, and that this was a share vested in the deceased child of *W.*, which passed to her representatives.

The cause subsequently came on for hearing, when the points in the case, other than the construction of the testator's will, were arranged between the parties by consent.

Mr. Boyd, Q. C., and Mr. Black, for the plaintiffs.

Mr. Moss and Mr. Kingsford, for the defendant *Leys*.

Mr. W. M. Clark, for the defendant *Sophia Defries*.

Mr. Delamere for the husbands of the female plaintiffs.

Mr. Snelling for the defendant *Catherine VanNorman*.

Mr. Perdue for the defendant *Alexander Doran* Argument
contended that the shares vested on the marriage of the widow; the period of distribution was alone postponed till after her decease, and *Doran* therefore was entitled to his mother's share, she having survived the date of the widow's re-marriage, though she died before the widow.

1881. *Tyrawhitt v. Dewson* (a), *Re Steeven's Trusts* (b), *Low v. Smith* (c), *In re Philps's Will* (d), *Packham v. Gregory* (e), *West v. Miller* (f), *Ruthven v. Ruthven* (g), were referred to.

Webster
et al.
v.
Leys et al.

June 14th.

PROUDFOOT, V.C.—Most of the matters in issue in this suit were disposed of by consent. There remains for decision a question as to the construction of the will of *John Earnest*, who gave £1500, in the event of his wife dying intestate, or in the event of her marrying again, and the proceeds of certain chattel property to be at her death divided, share and share alike, "among my heirs (my brothers' children)." In a preceding part of the same paragraph of the will he devised a lot to *Francis*, the son of his brother *George*. There is an apostrophe in the original will over the end of brothers, which appeared to me to be placed after the last letter s. In a subsequent part of the same paragraph he makes a bequest to two daughters of a brother *William*, and a bequest to *William* himself. The testator left surviving him the children of a deceased brother *Henry*.

Judgment,

It was argued that, in the event that happened of the widow marrying again, the bequest above set out went only to the children of *George*.

I think that the bequest was to the children of all his brothers, not to the children of *George* alone.

Another question was as to the children entitled, as a daughter of *William* died after the marriage, but before the death, of the widow, and so before the period for distribution.

The rule in such cases is, that a bequest in the form of a direction to pay, or to pay and divide, at a future period vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other

(a) Ante, p. 12.
(c) 2 Jur. N. S. 344.
(e) 4 Hare 396.
(g) 25 Gr. 534.

(b) L. R. 15 Eq. 110.
(d) L. R. 7 Eq. 151.
(f) L. R. 6 Eq. 59.

interest: *Hawkins* on Wills, p. 232; or, as stated by *Wigram*, V.C., in *Packham v. Gregory* (a): "If there is a gift to a person at twenty-one, or on the happening of any event, * * or a direction to pay and divide when a person attains twenty-one, then, the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or in the direction to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the greater convenience of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed." Judgment.

1881.

Webster
et al.
v.
Leys et al.

In the case before me, the only reason for postponing the payment appears to be to let in the life-estate of the widow, and a share vested in the now deceased child of *William*, and passed to her representatives.

This does not interfere with the argument that it was a gift to a class; it only determines that the class might be ascertained earlier than the period of distribution, in this case, at least as soon as the marriage of the widow.

(a) 4 Hare 396.

1881.

WATSON V. DOWSER.

Mortgage—Priority—Unpaid purchase money—Incumbrance.

C. being the equitable owner of land contracted by writing (registered) to sell to the defendant on 13th of February, 1877 Part of the purchase money was paid down. *C.* obtained an order on 17th April, 1878, vesting the land in him—there were two mortgages on the registry prior to one in favor of the Loan Company. On the 17th May the defendant gave an order on the Loan Company to pay the proceeds of a loan to their local agent, who was informed by one *J.*, a solicitor who had control of the two prior mortgages, that they were paid off and that he would get them discharged. Thereupon the agent paid *C.* the balance of his unpaid purchase money, and *C.* on 25th May, 1878, conveyed to the defendant. The Loan Company's mortgage was dated 15th May and registered the 25th May.

Held, on appeal from the Master [affirming his report] that the Loan Company could not stand in *C.*'s place and claim priority in respect of his lien for unpaid purchase money over the prior mortgages, following *Imperial L. & I. Co. v. O'Sullivan*, 8 Pr. R. 162.

The Loan Company's mortgage contained this clause, and it is hereby declared "that in the event of the money hereby advanced, or any part thereof being applied to the payment of any charge or incumbrance, the company shall stand in the position and be entitled to all the equities of the person or persons so paid off."

Held, that this provision could not affect prior mortgagees who were no parties to it; and *quære* whether it would apply to the discharge of unpaid purchase money which does not constitute a charge or incumbrance in the proper meaning of those terms.

This was an appeal by the defendants *The Loan Company* from the report of the Master on grounds which appear distinctly in the judgment.

Mr. Moss, for the appellants.

Mr. Boyd, Q.C., contra.

May 21st.

SPRAGGE, C.—The only question open upon this appeal is, the question of priority. The Master finds a certain sum due on the mortgage of *Dowser* to *Wat-*

son; a certain sum due on the mortgage of *Dowser* to *Page*, and a certain sum due on the mortgage of *Dowser* to the Loan Company; and these findings of the Master are not objected to by the notice of appeal. I must therefore take what the Master reports upon these points to be correct.

1881.

Watson
v.
Dowser.

The Master places the mortgage to the plaintiff as first in priority, the mortgage to *Page* second; and the mortgage to the Loan Company third; and in this he is right unless as claimed by the company their mortgage is entitled to priority by reason of an equity which they claim to raise in this way.

The defendant *Dowser* is the maker of the three mortgages. The land mortgaged was under contract of purchase from one *Camp*; a part of the purchase money had been paid; the agreement for purchase was registered before the making of any of the mortgages; so that *Camp's* lien for unpaid purchase money was paramount to any of the mortgages. This was the state of matters when the mortgage to the company was made. The application by *Dowser* for the advance, stated that it was wanted for the purpose of partly paying *Camp*; not well expressed, but meaning, I suppose, for the purpose of paying that part of the purchase money which remained due to *Camp*. It was so understood by the company, and the money was paid to *Camp* through the local agent of the company upon the written order of *Dowser*.

Judgment.

The two earlier mortgages were registered, and the company had besides actual notice of them. They were in the hands, or under the control of a Mr. *Charles Jones*, of St. Mary's, who informed the agent of the company that they had been paid, and that he would have them discharged; and upon this information and assurance the money was paid to *Camp*, who thereupon made a conveyance to *Dowser* in fulfilment of his contract.

The company now claim to stand in the place of

1881. *Camp*; to have the same priority from having paid the purchase money which gave him a paramount lien as he had when the purchase money was yet unpaid, and he still in the position of vendor. This is the principal question.

Watson
v.
Dowser.

There is a subordinate question as to the advance by the plaintiff, which to the extent of \$600 it is alleged was made for the purpose of paying *pro tanto* the purchase money due to *Camp*, and was so applied; and for which the plaintiff claims that he is in any event entitled to priority. This question only arises in the event of the company establishing their priority upon the ground they contend for.

The plaintiff and *Page* also contend that what the Loan Company asks for is founded on an equity outside their mortgage, and that at any rate they cannot obtain it in this way, but should have filed their bill instead of going into the Master's office upon the mortgage, upon the face of which they were subsequent incumbrancers. I will first consider the general question.

I think this case is not distinguishable upon the general question from the case of *The Imperial Loan and Savings Company v. O'Sullivan* (a), decided by myself upon appeal from the Master. In that case there were two mortgages. The first mortgagee was threatening proceedings against the mortgagor, when a gentleman, the Rev. Mr. *Conway*, paid \$1,000 direct to the mortgagee, whose mortgage debt was reduced *pro tanto*, and took a mortgage from the same mortgagor to secure the \$1,000 advanced, and the question was, whether Mr. *Conway* was entitled before the second mortgagor to the extent of the amount by which the first mortgage was reduced. The learned Master in his judgment, which is printed with the report of the case, reviewed the authorities, and came

(a) 8 Prac. Rep. 162.

to the conclusion that he was not so entitled, and I came to the same conclusion. 1881.

The case here is certainly not a stronger one. Here there was a lien for unpaid purchase money. The Loan Company intended that their mortgage should be a first charge on the land for they took a promise from *Jones* (which they seem to have relied upon) that the two mortgages then standing against the land should be discharged. They took a mortgage, which, as it stands without more, is subsequent to the other two mortgages. What is there to displace the priority of the other two. The payment to the vendor was upon the order of the purchaser, the mortgagor, and the conveyance was made to the purchaser and the estate was in him, and he thereupon made the mortgage to the Loan Company.

Watson
v.
Dowser.

I do not say it would not be reasonable under these circumstances that the Loan Company should for their advance, have priority over the two mortgages, but the question here is, does the law give them such priority. They might have taken an assignment from the vendor of the lien for the unpaid purchase money, but they simply took a third mortgage by way of security for their advance. Judgment.

The case is distinguishable from *Meux v. Smith* (a), in the way in which the advance was made and the security effected. It is necessary to go a little more into particulars. The contract of sale by *Camp* to *Dowser* is dated the 13th of February, 1877. Part of the purchase money was paid down, and it was agreed that *Dowser* should give a mortgage for the balance provided *Camp* should be in a position to give a conveyance on the 12th of March then next. The conveyance of *Camp* to *Dowser* does bear date of that day, but no mortgage was executed by *Dowser*. A vesting order, vesting the land in *Camp* is put in, dated the

(a) 11 Sim. 410.

1881. 17th of April, 1878, and the conveyance was not registered till afterwards, viz., on the the 25th of May, 1878. The mortgage of *Dowser* to The Loan Company is registered the same day. Its date is the 15th of the same month.

Watson
v.
Dowser.

On the 17th of the same month *Dowser* gave an order on *James Watson*, secretary-treasurer of the Loan Company to pay the proceeds of his loan to *A. McLellan*. *McLellan* was the local agent of the Loan Company, and on the 28th of the same month the manager and president of the company gave their cheque on the Bank of Commerce payable to *McLellan* for a sum which I understand to be the proceeds of their loan to *Dowser*.

Judgment. In *Meux v. Saeger* (a), the question was between the plaintiffs who had advanced £1,000 to one *Albin*, who was (unknown to them) an uncertificated bankrupt. The creditors of the bankrupt *Albin* had agreed to purchase from one *Gurney* a public house; and the advance by the plaintiff to *Albin* was to enable him to pay part of the purchase money to *Gurney*. The plaintiffs were secured for their advance by deposit of the title deeds executed by *Gurney* to *Albin*, and deposited by *Albin* by way of an equitable mortgage.

It is evident from the case that the equitable mortgage would not have been supported against the creditors of the bankrupt, unless it were made out that, previously to the contract being carried into effect between *Gurney* and the bankrupt, there was a contemporaneous contract between the bankrupt and the plaintiffs, by which it was agreed that although the bankrupt was to take a lease in his own name, yet that the lease so taken in his own name, was to the extent of the money advanced to be for the benefit of the plaintiffs. See as to this the language of Lord *Cottenham*, at p. 415.

There it was on an application for injunction. At the

(a) 1 M. D. & DeG. 396.

hearing the Vice-Chancellor supported the transaction with the plaintiffs upon the same ground, holding that "it was all one transaction," adding, "and it appears to me that the creation of the legal estate was simultaneous with the creation of the equitable lien of the plaintiffs." In that case there was nothing in the bankrupt for his creditors to fasten upon. In the case before me there was title in the mortgagor subject only to the two prior mortgages, and there was nothing in the carrying out of the Loan Company mortgage out of the ordinary course, unless it be that the money was applied for, and was applied in payment of purchase money, and in that it resembles in principle *The Imperial Loan Co. v. O'Sullivan*.

1881.

Watson
v.
Dowser.

I do not refer now to *Smith v. Drew* (a) and the other cases cited by Mr. Moss, though I have examined them since the hearing, because I think them plainly distinguishable from this case.

I do not understand that the Master has allowed payments made by *Montry* and *Knox* to *Jones* upon their notes as payments upon their mortgages to the plaintiff and *Page*. Assuming that these mortgage moneys were investments made through the instrumentality of *Jones*, it was not within his authority to make any stipulation as to payment, other than what was contained in the mortgages themselves; any such stipulation would not be binding on the mortgagees.

Judgment.

The mortgage to the Loan Company contains this: "And it is hereby declared that in case the company satisfies any charge on the lands the amount payable shall be payable forthwith, with interest, and in default the power of sale hereby given shall be exercisable, and in the event of the money hereby advanced, or any part thereof being applied to the payment of any charge or incumbrance, the company shall stand in the position, and be entitled to all the equities of the person or persons so paid off."

(a) 25 Gr. 188.

1881.

Watson
v.
Dowser.

Judgment.

In the notice of appeal it is objected that the Master should at least have reported the second branch of this provision as a special circumstance. I have not noted any argument upon it. I think at any rate it cannot affect prior mortgagees who are no parties to it, and it is at least doubtful whether it would apply to the discharge of unpaid purchase money which does not constitute a charge or incumbrance in the proper meaning of those terms.

It is unnecessary in the view I take of the case to discuss the question raised as to the advance of \$600 of the loan by the plaintiff to *Dowser*, being for the payment of purchase money.

The appeal is disallowed, with costs.

1881.

VANKOUGHNET V. DENISON AND WINNE.

Demurrer—Covenant against building—Injunction.

The owner of real estate in effecting a sale of a portion thereof covenanted with the purchaser that he would retain a certain square unbuilt upon, with the exception of one residence with the necessary outbuildings including porter's lodge; the purchaser on his part covenanting that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law to be carried on upon the portion conveyed to him. A bill was filed alleging that the vendor and the defendant *E. W.*, who resided with him, were in violation of the covenant erecting a house upon such square not within the exception in the covenant. The bill set forth the dimensions of the square, and alleged that the same was particularly shewn and delineated on the map of the city of Toronto published in 1857—and was situated between certain named streets.

Held, on demurrer for want of equity, that the square was pointed out with sufficient distinctness, and the fact that it comprised about six acres of land while the portion conveyed to the purchaser was about one-fourth of an acre only, was not such a ground of hardship as would prevent the Court from interfering by injunction to restrain the breach of covenant, and *E. W.* being joined with the vendor in the erection of the house, she could not be heard to say she had not notice of the covenant, and the demurrer was overruled with costs.

This was a suit to restrain the defendant *Denison* from committing, or suffering to be committed, a breach of covenant not to build upon a piece of ground in the city of Toronto, called Bellevue square, and which it was alleged he and the defendant *Winne* were doing. The plaintiff was grantee of one *Bovell*, who had purchased a lot of land fronting on Bellevue square, and in the conveyance of which to *Bovell* the covenant against building on the square was contained. Statement.

The defendants severally demurred for want of equity, on the grounds stated in the judgment.

Mr. Black, for the defendant *Denison*.

Mr. Delamere, for the defendant *Winne*, in support of the demurrers.

1881. Mr. *McLennan*, Q. C., and Mr. *S. VanKoughnet*,
 contra.
VanKough-
net.
v.
Denison
et al. *Stretton v. Stretton (a), Hodges v. Horafall (b), Hook*
v. McQueen (c).

March 10th. PROUDFOOT, V. C.—The bill is by an assignee of *Bovell*, a purchaser of a town lot in the city of Toronto, fronting on Bellevue square, from the defendant *Denison*.

In the conveyance to *Bovell* the defendant *Denison* covenanted with him and his assigns that the said Bellevue square should always remain unbuilt upon, except one residence, with the necessary outbuildings, including porter's lodge. And *Bovell*, on his part, covenanted with the defendant *Denison* that he and his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law, to be carried on upon the parcel conveyed to him.

Judgment.

The bill alleges that the defendant *Denison* and the defendant *Ellen Winne*, who now resides with him, are, in violation of the covenant, erecting a house upon Bellevue square, not within the exception in the covenant.

Bellevue square is stated in the bill to be in the city of Toronto, and is a rectangular piece of ground about 390 feet in width from north to south, by about 680 feet in length from east to west, extending from Grosvenor street, now called Corbett street, or Grosvenor avenue, to Grafton street, now called Leonard avenue; and its situation is more particularly shewn and delineated on the map of the city of Toronto published in the year 1857.

The defendant *Denison* demurs for want of equity.

(a) 24 Gr. 20.

(b) 1 Russ. & May 116.

(c) 2 Gr. 480.

The defendant *Winne* also demurs, I understand, for want of equity; but her demurrer has not been left with me.

1881.

Van Kough-
net
v.
Denison
et al.

The objections on *Denison's* behalf are, that the square is not described with sufficient precision. That the property to be kept vacant is about six acres, while the plaintiff's lot is only about one-fourth of an acre, is such a case of hardship that the Court will not enforce it. And that the plaintiff, while seeking performance of *Denison's* covenant, does not offer to perform that which is incumbent on him.

On *Winne's* behalf, that it is not said she had notice of the covenant.

This last I may dispose of at once, as I think it quite untenable. The bill alleges a joint act of *Winne* and *Denison* in building the house; and as *Denison* was the covenantor, he must have had notice: and *Winne*, being joined in violating the covenant with him, must stand or fall with his right, or liability.

Judgment.

As to the other objections: the first, that the square is not sufficiently described, is not maintainable. The specification of the number of feet as *about* so many would probably be too indefinite; but the boundary of two sides is given, being two streets; and the only uncertainty is as to the north and south boundary. But a reference is made to the map of the city, published in 1857. I must assume on this statement that only one map was published in 1857, and I think it is sufficiently incorporated with the description. In *Stretton v. Stretton (a)*, certain lots agreed to be sold were referred to as in *Stretton's* survey; but no survey had in fact been made, and of course the description was insufficient. In *Hodges v. Horsfall (b)* the reference was to "a plan agreed upon." But several plans had been produced, and it was not shewn which was the plan agreed upon. But neither of these sustains this objection.

(a) 24 Gr. 20.

(b) 1 R. & M. 116.

1881.
VanKough-
net
v.
Denison
et al.

As to hardship. There is nothing on the bill from which it could be inferred that there was any hardship. The mere difference in size is not enough for that purpose; and it is to be presumed that when Mr. Denison sold, the price he received was an equivalent for his agreement not to build. If any hardship has arisen *since the date* of the contract by reason of municipal impositions on vacant property, that is no defence to a bill of this kind.

Judgment.

The last objection is, that it contains, no offer on the part of the plaintiff to perform the covenant entered into by his grantor. The cases cited hold a bill demurrable that does not contain an offer to perform, on the part of the plaintiff, a covenant entered into by him. If the covenants were mutually dependent, if one were a condition precedent to the other, the bill would be defective. But on the best opinion I can form they are not of that nature. They are both negative, and in that respect materially differ from covenants to do positive acts. *Peto v. The Brighton, &c., R. W. Co. (a)*, was a case where the plaintiffs had agreed to build a part of a railway, for which the defendants agreed to give them certain shares. The bill was filed to restrain the defendants from dealing with these shares. There was no question but that the covenants were dependent, *i.e.*, that the right of the plaintiffs to the shares depended on their building the part of the railway, and the bill offered to perform the contract; but the injunction was refused, because the Court could not control the performance of such a contract. This determines nothing as to whether covenants such as we have here are dependent or not. I have referred to all the cases that were cited, and a great many more, but have failed to find any that would lead to the conclusion that the covenants here were dependent. As stated in the bill the one does not appear to be

(a) 1 H. & M. 468.

dependent on the other; nor is there anything in their nature, and no intention is alleged, to make them dependent. See *Gibson v. Goldsmid* (a). If the plaintiff has really violated his covenant, and if that be an answer to the relief he seeks, it must be raised by answer.

I therefore overrule both demurrers, with costs. Defendants to have a fortnight to answer.

1881.
VanKough-
net
v.
Denison
et al.

HUNTER V. CARRICK.

Patent of invention—Infringement of patent.

In November, 1879, the plaintiff obtained a patent for a new and useful improvement in bakers' ovens, which was expressed to be "In combination with a baker's oven, a furnace, 'D' set within the oven but below the sole 'A.'" This patent he surrendered, and a new one issued in August, 1880, on the ground that the first was inoperative by reason of the insufficiency of the description. The new patent was for the unexpired portion of the five years covered by the first patent. The claim of invention, as set forth in the specification, was, "1st. In a fire pot or furnace placed within a baker's oven below the sole thereof, and provided with a door situated above the grate. 2nd. In a fire-pot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide. 3rd. In a flue, 'H,' leading from below the grate, 'B' to the flue 'E.' 4th. In a baker's oven provided with a circular tilting grate situated below the sole of the oven, and provided with a door. 5th. In a cinder grate, 'F,' placed beneath the fire-grate, 'B,' in combination with a flue, 'H.'" The plaintiff, in his specifications, claimed all these as his inventions; in his evidence he claimed each of the combinations to be the subject of the patent. *Held* (1), if the plaintiff was correct in the latter view, that the last four combinations being new, the first patent could not have been inoperative as to them; and the second patent in respect of these must be construed as an independent one, issuing for the first time on its date, and as all other than the first combination had been used for upwards of a year prior to the patent, he was not entitled to a patent therefor; (2), that the 5th combination of previously

(a) 5 D. M. & G. 757.

1881.

Hunter
v.
Carrick.

known articles, as applied to a baker's oven, which was productive of results which were new and useful to the trade, was a subject of a patent.

Some of the devices were in use before the patent, but numerous witnesses engaged in baking testified that they never knew of the combination before the plaintiff's invention.

Held, that the defence of want of novelty failed.

Held, also, that the first combination in the patent of 1880 was such an amendment as is contemplated by sec. 19 of the Act 35 Vict., ch. 26.

The defendant's oven was completed early in July, 1880, and before the re-issue of the plaintiff's patent; she had in use the first and fourth combinations, and continued to use them after such re-issue.

Held, that there was not any remedy for the intermediate user, as the patent was then inoperative; but as to any subsequent infringement, the user under the defective patent could not operate as a defence.

The plaintiff having succeeded as to part only of his claim, no costs were given to either party up to the hearing. A reference as to damages having been directed, subsequent costs were ordered to abide the result.

This was a bill by *Thomas Hunter* against *Margaret Ann Carrick* seeking to restrain the use by defendant of a baker's oven, constructed on a plan which had been the subject of a patent in favour of the plaintiff, the particulars of which are set forth in the judgment.

Statement.

The defendant in her answer denied that her oven contained the plaintiff's improvements; alleged that she had employed a person to construct an oven for her but gave him no directions as to how or upon what principle he should build the same; denied any novelty in the construction of the oven the subject of the patent in favour of the plaintiff; alleged user by the plaintiff and others of ovens such as the one in question prior to the granting of the patent in favour of the plaintiff; that the improvements, as stated by the plaintiff, were not the proper subject of a patent and that the specification sent in by the plaintiff did not sufficiently set forth the particulars sought to be patented. The cause came on for the examination of witnesses and hearing at the sittings in Toronto in May, 1881.

Mr. *W. Cassels*, for the plaintiff.

1881.

Mr. *McMichael*, Q. C., and *A. Hoskin*, Q. C., for the defendant.

Hunter
v.
Carrick.

At the hearing one *Ridout* a practical engineer, who was called as a witness for the plaintiff, swore that (1) the fire pot placed within the oven with a door above the grate was for the purpose of supplying fuel, and (2) the tilting grate below the sole or floor of the oven, were the particulars of the patent in respect of which an infringement had taken place; that he had examined the defendant's oven, which had a fire pot or furnace inside the oven and below the sole, and was provided also with a door above the grate, with a shoot from the door to the furnace for the supply of fuel. A furnace being placed in a chamber to heat was not a novelty—the grate itself was not new, but a tilting grate was, and that the combination as set out in the patent was new.

Argument.

The other points in the evidence appear sufficiently in the judgment.

For the plaintiff it was contended that the evidence was conclusive on the point as to the value and usefulness of the invention; that the patent upon which the plaintiff relied for protection was that in respect of the first and fourth combination, as mentioned in the evidence of the witness *Ridout*; and *Murray v. Clayton* (a) shews that an infringement of any one of the combinations stated in the patent entitled the plaintiff to an injunction. He also referred to *Summers v. Abell* (b), *Bump on Patents*, page 212.

On behalf of the defendant it was insisted that the earlier patent of the plaintiff having been found to be void no liability attached to the defendant in respect of anything done by her with reference to the matters

(a) L. R. 7 Ch. 570.

(b) 15 Gr. 532.

1881. mentioned in that patent. The first patent was simply
for a furnace pot placed below the level of the sole of
the oven, and was not in respect of any combination
whatever.

Hunter
v.
Carrick.

Here the application for the patent was in August, 1880, and it was shewn by the evidence that the defendant's oven was built in July preceding; that section 19 of the Act (35 Vict. ch. 26), applied to acts which have been done after the obtaining of the patent not to those done before the patent was issued. They also contended that the patent was void for want of novelty, every part of the oven was old, and the simple combination of a door with the fire pot could not reasonably be treated as patentable; that the patent was defective also for claiming too much, that is, in respect of the tilting grate and door; the cinder grate and the flue, and also in the third claim in respect of the flue 'H.' The statute, the benefit of which was invoked on behalf of the plaintiff was

Argument.

intended, they said, to apply to cases only where an error had been committed in the specification not to a case where the second patent issued was for a matter entirely different from that specified for on applying for the first patent. If a thing has been used for one purpose there could be no patent for applying it to another similar purpose. Suppose a telescope has been in use for the purpose of viewing the moon through it; no one would dream of applying for a patent for a similar instrument because the party desired to use it for the purpose of viewing the sun. Here it was only a change of position, and *Yates v. The Great Western R. W. Co.* (a) shews that there is not any such combination as will warrant the granting of a patent.

On the whole counsel submitted that the patent was void, because the oven was known and used before the

(a) 2 App. 226.

plaintiff's invention; public use and sale thereof for more than twelve months; that it claimed too much; that the combinations under the circumstances were not the subject of patent; that it was not novel, neither was its usefulness of such a character as would justify a patent being granted, and that here it was shewn that all the defendant had done was done before the plaintiff had procured his patent.

1881.
Hunter
v.
Carrick.

Abell v. McPherson (a), *Cannington v. Nuttall (b)*, *Parkes v. Steven (c)*, were also referred to, and commented on by counsel.

PROUDFOOT, V. C.—On 27th November, 1879, the plaintiff obtained a patent for new and useful improvements in bakers' ovens, and claimed as his invention: "In combination with a baker's oven, a furnace 'D' set within the oven, but below the sole 'A.'"

On the 26th August, 1880, this patent was surrendered and a new one issued upon the petition of the plaintiff, which represented that the patent of 1879 was inoperative by reason of defective or insufficient description and specification which arose from inadvertence, accident, or mistake; this new patent was for the unexpired residue of five years, to be computed from the 27th November, 1879, and it describes the invention in accordance with the plaintiff's claim, as "1st., in a fire pot or furnace placed within a baker's oven below the sole thereof, and provided with a door situated above the grate; 2nd. In a fire pot or furnace placed within a baker's oven provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide; 3rd. In a flue 'H' leading from below the grate 'B' to the flue 'E'; 4th. In a baker's oven provided with a circular tilting

Judgment.

(a) 17 Gr. 23.

(b) L. R. 5 E & I.

(c) L. R. 8 Eq. 358.

1881. grate situated below the sole of the oven, and provided with a door; 5th. In a cinder grate 'F' placed beneath the fire grate 'B' in combination with a flue 'H.'"

Hunter
v.
Carriek.

In the specification attached to the second patent, the plaintiff claims these as *his invention*; but in his evidence he says he claims a patent for each of the five specified combinations, and not for a combination of them all.

If this be so, then, as to all except the first combination, the patent cannot be considered as properly issued under section 19; since these four latter combinations are new, and the first patent as to them could not be considered as inoperative by reason of insufficient description or specification, for they were not claimed at all; and the patent should in that respect be construed as an independent patent issuing for the first time in August, 1880.

The evidence satisfactorily establishes that the improvements are useful and valuable, enabling the baking to go on continuously, saving time and labour and effecting a large economy in fuel.

It will be observed that the first patent claims only in combination with the oven a furnace set within it, but below the level of its sole or floor. In the re-issue there is added to this—and provided with a door situated above the grate.

The plaintiff claims that the defendant has infringed the 1st and 4th combinations, *i. e.*, a furnace below the floor with a door above the grate, and a circular tilting grate below the sole and provided with a door; and the evidence establishes that the defendant has both these combinations.

But the defendant says that the improvements were known and used before the plaintiff invented them; that they were in public use and on sale more than a year before the application for a patent with the consent or allowance of the inventor; that they are not novel—not useful—and not such a combination as can be the subject of a patent.

I think the combination is such as may be the subject of a patent; it consists of previously known articles, a circular grate, made to shake and tilt, such as is used in base-burner stoves; a door to feed the fuel, and one to remove the ashes; but the location of these well-known appliances in a baker's oven, so as to procure, what could not otherwise be obtained, continuous baking, saving of work and time, and economy of fuel, possesses so much of skill and invention as to justify a patent. That it is useful, appears from what I have just said.

1881.

Hunter
v.
Carriek.

There remains, therefore, to be considered if it is novel, and if the defendant has infringed it.

Ireson, who built the defendant's oven, says that he built one for *Frogley* in July, 1879, in which he sunk the fire-pot below the sole five inches. It had no separate door. He built one for *Pearce* with two or three inches depression. He built one for *Coleman* seven years ago, with one and-a-half inches depression. *Coleman* says his had no separate door. *Ireson* built two for *Lawson* with the circular grate but no depression. *Ireson* took the contract for building defendant's oven in May, 1880, and finished it July 3rd, 1880. He procured copies of the plaintiff's specifications, which the defendant told him to avoid infringing. But he says it is hard for him to tell how much the one he built for the defendant differs from the plaintiff's; and he says he never saw the combination in the 1st and 4th specifications before.

Judgment.

Dempster, in 1878, altered his oven, but his furnace had no fire-pot; the grate did not tilt, and the door was on a level with the sole. He altered his furnace in 1880, after his son saw *Fairbairn's*.

Kennedy, in March, 1879, built an oven for *Anderson*, which had a feeder, round sunk grate, a tilter but not a shaker; but this was after inspecting ovens built by the plaintiff, who took *Anderson* round to show him those he had built, and told him it was his invention.

1881.

Hunter
v.
Cerrick.

The first improved oven built by plaintiff was on January 2nd, 1879, for *Barrow*; on January 10th, 1879, one for *Christie*; July 3rd, 1879, one for *Tait* and *Reynolds*. *Anderson* was shewn the two first of them. *Fairbairn's* was fitted with plaintiff's improvement in September, 1879,

I do not think this evidence deprives the plaintiff of the merit of novelty in the combination he has invented. While some of his devices were in use before, as the sunk grate; it never was combined with the separate door to feed it, so that the fuel had to be supplied by the oven door, thus occasioning a great loss of heat, and a larger consumption of fuel. Some seem to have had grates, but not *tilters*, or not *shakers*. Numerous witnesses were produced by the plaintiff, who are largely engaged, and have been for many years engaged, in the baking business, who testify to the value of the invention, and that they never knew of it till he invented it. The defence of want of novelty, in my opinion, fails. I do not think the invention was known or used by others before his invention.

Judgment.

The plaintiff claims that the defendant has infringed the patent in regard to the feed-door, the fire pot, and the grate.

The feed-door and the grate are not protected by the patent of 1879. The fire pot or furnace was, and the 1st combination in the re-issued patent of 1880, coupling the feed door with the fire pot, would seem such an amendment as contemplated by the 19th section of the Act of 1872. The other combinations, the plaintiff says, are all distinct inventions, and the patent of 1880, must, therefore, as to them, be considered as an original patent. But the plaintiff had used all these combinations as early as January, 1879, and all except the first were therefore in public use with the consent or allowance of the plaintiff, the inventor, for more than a year previous to his application, and under the 6th section of the Act, he was not entitled to a patent

for them. The 19th section only authorises a new patent for the same invention, not for new and additional inventions. 1881.

Hunter
v.
Carriek.

The defendant's oven was completed July 3rd, 1880, and before the re-issue of the patent. The fire pot was an infringement of the first patent, if the patent was operative; but, although that patent was surrendered the re-issue destroyed the operation of user, between the issue of the two patents as invalidating the latter.

There is no remedy for the intermediate user, as the patent was then inoperative, but for the subsequent infringement, the user does not operate as a defence: *Patric v. Sylvester*, (a). The 19th section of our Act of 1872, is in similar terms to section 4916 of the American Patent law, (*Bump on Patents*, p. 170,) and numerous decisions have been made under that law, determining that no prior use under the defective patent, can authorize the use of the invention after the issuing of the renewed patent. Any person using an invention protected by a renewed patent, is guilty of an infringement however long he may have used the same after the date of the defective and surrendered patent. See the cases cited in *Bump*, p. 187. These cases seem to construe the law as it ought to be construed under our statute. Judgment.

The defendant must, therefore, be restrained from continuing to use the oven with the fire pot and feed door, so as to infringe the 1st clause of the invention described in the re-issued patent, and an account will be taken of the damage the plaintiff has sustained by reason of such infringement since the date of the re-issue.

As the plaintiff has succeeded only in part, there might be an apportionment of the costs, but a simpler and probably as just a mode will be to say there shall be no costs to the hearing. The costs of the reference will abide the result of the reference.

(a) 23 Gr. 573, 582.

1881.

SIVEWRIGHT v. LEYS.

Will, construction of—Conversion of realty—Demurrer—Chose in action—Married woman.

The bill for the administration of the estate of *G. E.* alleged that *G.* had appointed his brother *J. E.* his executor, and devised to him all his estate upon trust for the benefit of the testator's wife and children as to *J.* would seem best: the will giving *J.* power to sell the realty. *J. E.* proved the will of *G.*, and shortly after his death made his own will by which he purported to dispose of *G.*'s estate, the validity of which the bill impugned, and *C. S. D.*, a married daughter of *G.*, was made a defendant, the bill alleging her to be the wife of *S. H. D.* *J. E.* made an appointment under *G.*'s will, whereby *C. S. D.* became entitled to a portion of the estate. The defendant demurred on the ground that *S. H. D.* should have been a party.

Held, that the interest of *C. S. D.* was merely a chose in action not reduced into possession by her husband, in respect of which she might be sued as a *feme sole*, and therefore the demurrer was overruled with costs following *Lawson v. Laidlaw*, 3 App. R. 77.

The bill distinctly charged that the defendant had misapplied the moneys of the estate of *G.* mixing them with his own and employing them for his own purposes, a demurrer *ore tenus* that *G.*'s estate was not properly represented, on the ground that one executor could not represent the estates of both *G.* and *J.*, was also overruled with costs; for although during the progress of the cause it might become necessary to have different persons represent the two estates that did not constitute a ground of demurrer.

This was a bill filed the 25th of March, 1879, amended the 8th of February, 1881, by *Ida Maria Sivewright, Rachel Savage, Mary Raymond, Jane Metzler, Victoria Tobin*, by their next friend; and *Bonaparte Earnest, William Henry Earnest* (who died during the progress of the cause), and *Francis Earnest* against *John Leys, Francis B. Leys, Catharine Sophia Defries, Charles Webster, Henry Savage, Joseph Raymond, Patrick Tobin, and John Philip Sivewright*, setting forth that *George Earnest*, late of Toronto, on the 1st of March, 1856, made his will, whereby he devised and bequeathed to *John Earnest* (his brother),

Statement.

and his executors, all his real and personal estate upon trust, to sell the real estate and make good and sufficient conveyances thereof, and to make use of the proceeds thereof, together with his personal estate, for the benefit of his wife and children, as to him and his executors should seem best, and he appointed the said *John Earnest* executor of his said will, who duly proved the same.

1881.

Silverright
v.
Leys.

The bill further stated that *John Earnest* duly made his will on the 14th of March, 1856, and thereby appointed the said defendant, *John Leys*, and other persons named in the report of *Webster v. Leys*, ante page 471, the executors thereof; that the said *John Earnest* directed the real estate of *George* to be sold, and the proceeds to be divided after the death of his widow amongst the children of *George*, of whom the defendant *Catharine Sophia Defries* was one; and that the defendant *John Leys*, who had alone acted in the matter of the said estate, had realized a large sum of money belonging to the said estate, and charged that he had misapplied the same by appropriating the amount to his own uses, and prayed an account of his dealings with the said estate, payment over of the moneys, that it might be declared that the will of *John Earnest* had not had the effect of altering or varying the trusts of the estate of *Georje Earnest*, and for other relief consequent thereon.

Statement.

The defendant *Leys* demurred for want of parties, on the ground that *Samuel H. Defries*, the husband of *Catharine S. Defries*, was not a party.

Mr. Moss and Mr. Kingsford for the defendant *Leys*.

Mr. Black for the plaintiff.

Mr. M. Clark for Mrs. *Catharine Defries*.

Mr. Delamere and Mr. Caswell for other parties.

1881.

Slivewright
v.
Leys.

PROUDFOOT, V. C.—This bill is by the beneficiaries under the will of *George Earnest* for an administration of his estate. *George*, by his will, appointed *John Earnest* his executor, and devised to him all his estate upon trust for the benefit of his, *George's*, wife and children, as to him (*John*) and his executors might seem best. The will contained a trust to sell his real estate. *John* proved the will, having within a fortnight after *George's* death, made his own will, appointing the executors referred to in the suit of *Webster v. Leys*, and made a disposition in his will of *George's* estate, the validity of which is questioned in this suit.

To this bill *Catharine Sophia Defries* is made a defendant. She is a daughter of *George*, and is alleged to be the wife of *Samuel H. Defries*. In this respect it differs from the bill in *Webster v. Leys*. The demurrer on the record is because the estate of *Samuel H. Defries*, the husband of *Catharine H. Defries* is not represented in this suit. It is to be ascertained then whether he has any estate from being such husband; and if he has, if he requires to be a party.

Under the trust in the will of *George* for *John* to sell and divide the proceeds a conversion was effected, and the property became personal. The appointment under the will of *John* in favour of Mrs. *Defries*, as one of *George's* children, is therefore an appointment of so much personalty.

Both wills were made and took effect in 1856. The interest of Mrs. *Defries* is a *chose in action* which has not been reduced into possession by the husband; and under *Lawson v. Laidlaw* (a), it is separate estate of the wife, in which the husband has no interest. With respect to it she may be sued as a *feme sole*. This demurrer is overruled.

It was further objected, *ore tenus*, that *George's*

(a) 3 App. 77.

estate was not properly represented. That as there was a question whether the trusts of *George's* will were carried out by *John's* will, the same executor could not represent both.

1881.
Sivewright
v.
Leys.

Both estates are represented; and the objection is not for want of representatives, but that some one else should be appointed to represent one of them. It is alleged that *John Earnest* never sold any of *George's* lands, and that the acts complained of are the acts of *Leys*, the present demurring defendant.

It is possible that during the progress of the suit it may become necessary to have different persons to represent the two estates; but that is not, it seems to me, a subject of demurrer. It is a matter resting in the discretion of the Court.

Judgment.

It is distinctly charged in the bill that *John Leys* has misapplied the money of *George's* estate, mixed it with his own, and employed the same for his own purposes. The demurrer admits this, and it is a subject that those interested in *George's* estate are entitled to have an answer to, whether *John's* estate be fully represented or not; it being always in the power of any persons concerned to have the representation filled up.

This demurrer is also overruled.

George's

1881.

VINDEN V. FRASER.

Fraudulent conveyance—Chose in action.

The defendant *F.* was married in 1849 without any settlement. He was appointed and acted as executor of the estate of his wife's father, and, acting on behalf of his wife, he received large sums from the estate which it was alleged he borrowed from her:—£7,600 before 1859, and £2,800 in 1879; all such moneys being charged to the wife in the books of the estate. The conveyances impeached in this suit were of lands which, with other property, had been purchased by the husband with the moneys so received on account of his wife, the deeds for which, however, had been taken in the name of *F.* The mother of his wife had frequently requested *F.* to settle these properties on the wife, and which he did not object to do, and in 1873, when he with his wife was about to visit Europe, *F.* did convey the property in question to the wife. In 1872 and 1873 *F.*, jointly with one *C.*, entered into extensive speculations and made a considerable amount of money. In 1873 *F.* indorsed *C.*'s note for \$10,000, which *C.* discounted, and the same remained unpaid, and *F.* in 1874 gave his cheque to the plaintiff for \$4,000 on which this suit was instituted.

Held, (1) that as to the £7,600, *F.* having acted for his wife in obtaining this money from her father's estate, and having never made any claim thereto in exercise of his marital right, having borrowed it only, as established by the testimony of the wife's mother, there was no reduction into possession by the husband of the money. (2) And as to the £2,800 the *onus* was upon the plaintiff to establish a gift to the husband by the wife, which he failed to do; on the contrary, the evidence shewed it to have been a loan.

When *F.* incurred the liability for *C.*, he was in affluent circumstances, and continued to be so for a year after the conveyance impeached in this suit; after which period the liability to the plaintiff was incurred:

Held, that the plaintiff was not, in respect of his own claim, in a position to impeach the conveyance, and could not be in a better position than the prior creditors, who clearly could not have avoided the transaction, the settlement having been made when the settlor in a pecuniary point of view was well able to make it.

Statement. The plaintiff in this cause instituted proceedings against *William Fraser* and his wife and *Charles H. A. Williams*, for the purpose of impeaching certain conveyances made by the defendant *Fraser* to his wife.

1881.

Vinden
v.
Fraser.

The bill alleged that in 1873 *Fraser* was in debt and engaged in large speculations in grain and otherwise, which ultimately ended in his ruin, and that in the years 1873, 1874, and 1875 he had made these conveyances to his wife in order to defraud his creditors—present as well as future. Amongst other properties so conveyed were a property known as the brewery property, situate in the town of Port Hope, also a property purchased from the Bank of Toronto, in the same town, and a leasehold property also situate there, together with a large amount of bank and other stocks, all of which were so conveyed in November, 1874, the conveyances of which were voluntary and fraudulent; and at the date of such conveyances *Fraser* was indebted to plaintiff in the sum of \$4,000 for money lent, and which had never been repaid to plaintiff, and that Mrs. *Fraser* afterwards conveyed the several properties to the defendant *Williams* in trust for her use.

The defendants answered the bill denying all fraudulent intention in making the deeds now impeached, and asserting that the properties had been purchased with the moneys of Mrs. *Fraser*, obtained by her from her father on his estate. Statement.

The cause came on for examination of witnesses and hearing at the Spring sittings of 1881, in Toronto.

Mr. *MacLennan*, Q.C., and Mr. *Riordan* for the plaintiff.

Mr. *Benson*, Q.C., and Mr. *Moss* for the defendants.

The effect of the evidence adduced at the hearing appears in the judgment.

On behalf of the plaintiff it was contended that the money received by *Fraser* on behalf of his wife could not in any sense be deemed a borrowing thereof; but was a simple reduction into possession, and therefore the money though it was derived from her property, became the money of the husband.

1881.

Winden
v.
Fraser.

The Act of 1859—Married Woman's Act—made no difference in this respect; it had not the effect of making the wife's property separate estate, but simply enabled the married woman to enjoy her property free from the debts of her husband: *Buckland v. Rose* (a), *Royal Canadian Bank v. Mitchell* (b), *Merchants' Bank v. Clark* (c).

Counsel for the defendants admitted the debt claimed by the plaintiff against the defendant *Fraser*, and submitted to a decree being made as against him for that sum and interest.

As to the other parts of the relief sought it was contended that there was not any evidence of *mala fides* or of fraud, either legal or moral, in the carrying out of any of these impeached transactions. They insisted that the evidence clearly established that *Fraser* at the time of making the transfers was in such affluent circumstances as to justify him in making the settlement even out of his own moneys; leaving out of view the fact that the properties he was conveying had been purchased with moneys borrowed from his wife: *Masuret v. Mitchell* (d), *Lush v. Wilkinson* (e), *Kidney v. Coussmaker* (f), *Kerr v. Read* (g).

June 14th. PROUDFOOT, V.C.—The plaintiff is entitled to a decree against Mr. *Fraser* for \$4,000, and interest from 30th November, 1874, with costs as if the suit had been heard on bill and answer.

So far as relief is sought against the property now vested in the wife, the facts appear to be as follows:—
Judgment. Mr. and Mrs. *Fraser* were married in 1849, without a marriage settlement. Mrs. *Fraser* received conveyances of some lands, after this, from her father, Mr. *Williams*, and on his death, in 1854, became entitled

- (a) 7 Gr. 440.
(c) 18 Gr. 594.
(e) 5 Ves. 384.
(g) 23 Gr. 525.

- (b) 14 Gr. 412.
(d) 26 Gr. 435.
(f) 12 Ves. 136.

to a large sum from his estate—in fact, she has received from that source, in money and lands, to the value of \$111,000. Mr. *Fraser* was an executor and trustee of Mr. *Williams'* estate, and kept the accounts of the estate. Between 1854 and 1859 he borrowed from his wife several sums, amounting to about £7,600, and charged them to his wife in the accounts of the estate. In June, July, and November, 1879, he borrowed three other sums from her, amounting in all to £2,800, which were in like manner charged to her in the books of the estate. This sum went into the purchase of the brewery property, part of the land now attacked.

The bank property was also purchased with Mrs. *Fraser's* money.

The deeds of both of these were taken in Mr. *Fraser's* name.

In 1860 Mr. *Fraser* bought sixty shares of bank stock for the estate of Mr. *Williams*, and twenty for himself, bought with his wife's money to qualify him as a director of the bank. The sixty shares were afterwards distributed (October, 1873), and twenty of them allotted to Mrs. *Fraser*, but all stood in Mr. *Fraser's* name. In 1875 Mr. *Fraser* assigned his shares to his wife, through *Hugh Leitch*, with eight shares added as a part of the increase or bonus to which she was entitled. No instrument was executed shewing her interest in these shares till 1875.

In 1871 some land was bought from the Synod of Toronto, but only \$300 or \$200 paid on it. This money came from some land of the wife's that had been sold, and the deed was intended to have been taken in her name, but by mistake it was made to the husband. The land adjoins other land of the wife's, and was bought to prevent any other person building on it.

Before Mr. *Williams'* death, he asked Mr. *Fraser*, and Mr. *Fraser* promised, to convey the bank property to his wife if he did not repay the money that had

1881.

Vinden
v.
Fraser.

Judgment.

1881. been borrowed to invest in it. This request and promise is only proved by Mr. *Fraser*.

Vindon
v.
Fraser.

Mr. *Fraser* also testifies that he kept an account of the money he received from his wife in a book that was burnt in 1871, when a fire occurred in the office near the bank.

Mrs. *Williams*, the widow of the testator and the mother of Mrs. *Fraser*, testifies to having often urged Mr. *Fraser* years ago—as early as 1860—to settle his wife's property on her; that he did not object to do so; that he never claimed it as his own, but got it acting for his wife.

Col. *Williams*, a brother of Mrs. *Fraser*, testifies that he has kept the books of the estate, under the direction of the executors, since 1860, shortly after he came of age, and proves the amount of the interest of Mrs. *Fraser* in the testator's estate.

The deed impeached was made on 8th September, 1873.

Judgment.

Mr. *Fraser* down to 1875 was wealthy. In 1874 he considered himself worth \$100,000, and he details some particulars of it, running up to about \$70,000, and says he had other property which he did not at the time recollect; and see no reason to question the accuracy of his account that he was then worth about \$100,000.

In 1872 and 1873 he had some small transactions in grain and lard that turned out well. In 1873 he and Mrs. *Fraser* went to Europe, and before leaving this country the deeds in question were executed. He returned in May, 1874, and found that the ventures in which he and Mr. *Cosby* had been engaged in Chicago and New York had turned out well, and they realized between \$70,000 and \$80,000. Similar undertakings were gone into in 1874, and if they had been content with doing very well and sold in April, 1875, they would have made money; but, desiring to do better, they held on; a change in the market took place and they lost heavily.

In August, 1873, *Cosby* borrowed \$10,000 to make a purchase of bank stock; *Fraser* indorsed his note, and it has not been paid. 1881.

On the 30th November, 1874, *Fraser* gave his check to the plaintiff, upon which this suit is brought.

I think these are all the material facts in the case upon which the rights of the parties are to be determined.

Prior to the Act of 1859, marriage operated as a gift to the husband of the personal property of the wife, except her choses in action, and of these also on the condition of reducing them into possession. That Act, however, enabled her to hold and enjoy all her real estate and all her personal property not previously reduced into possession by her husband, free from his debts and obligations contracted after that date, and from his control and disposition without her consent in as full and ample a manner as if she were unmarried.

All Mrs. *Fraser's* property consisted in her claim upon her father's estate, and was a chose in action. What was got by the husband before the Act of 1859, to effect a reduction into possession, must have been obtained in the exercise of his marital right. But if, instead of asserting that right, he chose to borrow the money and promised to repay it, he became a debtor to his wife for the amount; a debt that could be enforced in this Court. To establish such a promise there must be satisfactory evidence, and if the evidence be satisfactory, even giving full effect to *Merchants' Bank v. Clarke* (a), it need not be corroborated, though, of course, if corroborated it is so much the more satisfactory. The evidence here does not depend solely on the testimony of the husband. Mrs. *Williams*, so long ago as 1860, suggested to the husband the propriety of settling the wife's property on her—and often afterwards—i. e., the property he had borrowed from his wife. In reply to this he makes no assertion of his right to the property; he does not claim that it, or part of it, has

Vinden
v.
Fraser.

Judgment.

1881.

Vinden
v.
Fraser.

become his by reduction into possession, or that she has made a gift to him of it. On the contrary, he makes no objection, and admits that he got the property from the estate "acting for his wife." This was at a time when there was no question of creditors—fourteen years before the debt in question in this suit was incurred—and when the only claimants of the property were the husband and wife, and when any acknowledgement or admission by the husband was against his interest. This seems to me an abundant corroboration of Mr. *Fraser's* evidence, if corroboration be required, that he had borrowed the money from his wife. This applies specially to the £7,600 borrowed before 1859.

With regard to that borrowed after May, 1859, it is incumbent on the plaintiff to shew that the wife had made a gift to her husband of the money. It is true the statute does not in express terms call the wife's personal property her separate estate, but it confers upon it all the incidents of separate estate except that of alienation.

Judgment.

If a gift is to be inferred from allowing the husband to receive the money, it is met by his evidence that he did not receive it as a gift, but as a loan, and his evidence is corroborated in this respect also by what I have quoted from Mrs. *Williams's* testimony.

The evidence of all the witnesses was eminently satisfactory. They were persons of respectability, and gave their testimony with a candour and fairness that had every element of sincerity and truth; and I entirely believe there was no fraudulent intention in any of their acts.

Another circumstance to be borne in mind in considering the acts of the parties is that Mr. *Fraser*, as executor of Mr. *Williams*, was a trustee for Mrs. *Fraser*, and all her money had to pass through his hands in that capacity. The receipt of the money by him, therefore, was not of itself any proof of reduction into possession, nor of a gift to him by his wife. When he

conveyed the lands to her in 1873, I therefore think, 1881.
he was only investing her with her own property, or
an equivalent for part of it that he had received.

Upon another ground, also, I think the plaintiff fails
successfully to impeach these deeds. His own debt was
incurred in November, 1874—more than a year after
the execution of the deeds—and he is therefore obliged
to rely on the debt incurred by *Cosby*, for which *Fraser*
was liable, in August, 1873, for \$10,000, all or part of
which has not been paid. *Fraser* was then, as I have
said, worth about \$100,000. He was engaged in a
transaction with *Cosby* which in the following spring
realized some \$70,000 or \$80,000. He was just about
proceeding to Europe, and made the deeds in fulfillment
of his alleged liability to his wife, to provide against
the contingencies of travel. He left a power of attorney
with *Cosby* to act for him, but limited the amount for
which he was to be involved to \$1,500. The circum-
stances do not establish a fraudulent intention, and are
all consistent with the alleged legal and proper motives.
There was, in my estimation, no fraud morally in the
transaction. Then was it one of such a nature as to
infer legal fraud. It was stated as a general proposi-
tion that a subsequent creditor establishing a debt,
prior to the impeached transaction, not satisfied, was
entitled to set it aside. I do not think the cases, and
certainly the reason of the thing does not, establish any
such wide rule. The subsequent creditor cannot be
in any better position than the prior creditor if he
had chosen to file a bill. And if the prior creditor
had filed the bill, he would not have been entitled to
set aside the transaction merely because it was vol-
untary. He would have had to go farther. He
would have had to shew that the debtor was so much
in debt, so involved, that he could not pay his debts,
or that the effect of the settlement was to reduce
him to that position, or that there was fraud in fact.
This latter is, in my opinion, out of the question; and

Vinden
v.
Fraser.

Judgment.

1881.

Vinden
v.
Fraser.

as to the former, we have evidence that for eighteen months after the settlement the debtor had abundance to pay all his debts and leave a large surplus. At a later period than the settlement I think it is satisfactorily shewn that he was worth about \$100,000, and if he had been called upon to pay the whole of his indorsement for *Cosby*, which he had no right to assume would be the case, he would still have had \$80,000 or \$90,000 left. It is true he was engaging in what are, no doubt, hazardous speculations in produce in Chicago and New York, but, so far from rushing blindly and recklessly into them, he was expressly limiting his liability to \$1,500. I think that a settlement of property which appears to be of the value of \$11,000 was not beyond his power to make; that he did so without any fraudulent design, and that it cannot now be impeached.

Judgment.

The bill is dismissed against Mrs. *Fraser*, and the defendant *Williams*, with costs.

1881.

IRWIN V. YOUNG.

Voluntary deed—Independent advice—Costs.

Where it was shown that a voluntary deed had been executed without independent advice, the grantor standing in such a relation to the grantee, as that he was likely to be under her influence, the Court, [SPRAGUE, C.,] owing to the peculiar relationship of the parties, set the conveyance aside, although no fraud or moral wrong could be imputed to the grantee; and although it was probable, from all the circumstances of the case, that if the contents and legal effect of the instrument had been fully explained to the grantor by an independent legal adviser, the grantor would still have executed the deed though probably with some modifications in the details. The relief was granted without costs, however, as no case of actual fraud was established;—in this following *Lavin v. Lavin*, ante Vol. xxvii., p. 507.

The bill in this cause was filed by the heirs of the late *Robert Irwin* deceased to set aside a conveyance made by him to the defendant *Isabella Young* of 100 acres of land, being the north half of lot No. 26, in the fourth concession of the township of Ancaster, which was alleged to be of the value of \$5,000 and upwards.

Statement.

The bill set forth in substance that in or about the month of November, 1878, *Robert Irwin*, who was an old man—upwards of seventy-five years of age—very infirm, and in very delicate health, of weak mind and understanding, went to reside with the defendant *Isabella Young* and her husband *Theodore Young* the elder, the latter being then the lessee of the land in question; that he continued to reside there from that time until his death; that besides the lands in question he was possessed of other property, real and personal, to a considerable amount, and being old, feeble, and weak in mind, he intrusted the transaction of his business to the defendant *Theodore Young* the younger, who was a son of *Isabella*, and then resided with her. The bill further stated that these two, mother and son, acquired great influence

1881. over the deceased, and he placed such confidence in them that he entrusted to them the management of his business and property, and that this influence continued to the time of his death, which took place in October, 1879. The bill further stated that in the month of July, 1879, the defendants *Isabella* and her son *Theodore*, procured and induced the old man to sign his name to an ordinary short form of conveyance, purporting to be made between the said *Robert Irwin* of the first part; and the defendant *Isabella Young* of the second part, wherein it was recited that the said defendant had at different times and for long periods waited upon, boarded, nursed and cared for the said *Robert Irwin* during several illnesses of the said *Irwin*, and the said defendant had agreed with the said *Irwin* to provide him with all necessary food, washing, attendance and nursing, during the remainder of his life, to secure the carrying out of which the said defendant had agreed to execute a mortgage to the said *Irwin*, bearing even date with the said indenture, and in consideration of the premises the said *Irwin* had agreed to convey the lands mentioned to the said defendant *Isabella Young* to the use of the said *Irwin* during his life, and at his death to the use of the said defendant, her heirs and assigns forever; and whereby the said *Irwin* purported to convey to the said defendant in consideration of the said agreement and the sum of one dollar the said lands, to have and to hold unto the said defendant in fee simple to the use of the said *Irwin* during his natural life and at and after his death to and for the sole and only use of the said defendant; her heirs and assigns, forever; that for a long time before the said *Irwin* signed the said indenture he had been bedridden and confined to the house by weakness and imbecility, and was wholly without independent advice or assistance in reference to the said indenture, and there never was any consideration therefor, and he never understood the same or its effect,

Irwin
v.
Young.

Statement.

1881.


 Irwin
v.
Young.

and the plaintiffs charged that the said indenture and the execution thereof had been improvident and were obtained from the said deceased by undue and improper use on the part of the defendants *Isabella Young* and *Theodore Young* the younger, of their influence over him and the confidence he reposed in them as aforesaid and by their taking advantage of the weak and imbecile condition of the said *Robert Irwin* as aforesaid, and after procuring the execution of the said deed the said defendants and their family always prevented the friends and relatives of the said deceased from having free access to him: and that the said indenture had been registered against the title to the said lands in the registry office for the county of Wentworth, and was a cloud upon the title to the said lands.

The defendant *Isabella Young* answered admitting the formal allegations in the bill, and setting up that for about ten years prior to his death the deceased had received a great deal of assistance from her, in the way of little attendances, baking bread for him, nursing, &c., and she claimed to be absolute owner of the lands under and by virtue of the impeached conveyance; and she denied that she used, or that her co-defendant her son used any undue or improper influence to procure the same; and she also denied that at the time of its execution *Robert Irwin* was imbecile or unfit to transact business. She also denied that the residence of the deceased in her husband's house was of her seeking; and alleged that he was a man of unpleasant personal habits, and his illness and constant presence in the house made it almost unbearable for herself and family; that she asked him shortly after he came to stay in her husband's house, sometime during the month of November, 1878, to make some other arrangement for his living as it was inconvenient for her to keep him, that he insisted she should keep him, *and take care of him as long as he lived*, and that if she did he would give her the farm. The answer further set

Statement.

1881. up that he was very strong willed and insisted upon this arrangement, and the suggestion as to his giving her the farm was wholly his own. That understanding that she *would be paid by the conveyance of the farm*, she attended, clothed, nursed, and took care of him in good faith, until his death in October, 1879, without receiving any money or consideration therefor, save the conveyance; and that she executed back the mortgage to secure him in the performance of her part of the consideration therefor.

Irwin
v.
Young.

The defendant *Theodore* set up the same defence as his co-defendant *Isabella Young*.

Statement.

The defendants were both examined and among other statements made by them set forth that the deceased "was a very penurious, stingy old man," that he did not live comfortably in his own house, did not enjoy the comforts of a house; was miserly; that he did not like to part with his money, of which he had a good deal out at interest, and that no one in the neighborhood lived so uncomfortably; that he was peculiar in his ways, was always talking to himself in a muttering way, and had heard of him doing strange things; that he was a strange man, and that they were not surprised to hear this; that the defendant *Theodore* had done a great deal for him in looking after his notes, calculating interest, making out accounts, &c., for about six or seven years; that he used to drive the deceased around, using the old man's horse and buggy; that the deceased had confidence in *Theodore*, who acted as his agent, and also in defendant *Isabella* and her husband. It also appeared that the deceased had given *Theodore* a cheque for over \$900, a deposit receipt. No part of this was paid to *Isabella*, all went to *Theodore*, for his services. They further stated that the old man said if *Isabella* would keep him as she had done before, he would leave her the place which was worth \$4,000, and that this arrangement was made about three or four weeks after he came to reside with

1881.

Irwin
v.
Young.

the defendants, in November or December, 1878; and further that when she was urging him to go to another place, she was satisfied then with his word, but as he did not carry it out *she wanted witnesses*. She further stated that her husband had in the meantime got another lease of the farm for a further term of five years, although he knew that deceased had promised to leave it to her; and that the defendant *Theodore* wrote a letter for the old man to Mr. *Osler*, his solicitor, asking him to draw a will leaving her the farm; and that the old man signed this letter. She further stated that *Theodore* went to Mr. *Osler* with this letter, but returned without the will; and that it was then suggested that he had better make a will of all his property, or for him to give a deed and take a mortgage of the farm, and that the deceased agreed to this, and *Theodore* returned to Mr. *Osler* about 1st June, 1879, and brought back the deed and mortgage, which were read over to the deceased, who was then confined to his room, not being able to go out; that he occupied his bed by times; and that when the deed and mortgage were read over to him he said "that would do, * * he would think over it, * * did not feel very well, he understood the papers perfectly well but would not sign the deed until he thought it over." * * Spoke to him again about it in a week, asked him if he was going to sign the papers? No one was present, he said he would; he was then confined to his room. *Theodore* had the papers, he was acting for the old man, kept his money and papers, was his agent, he got the deed and mortgage and came up stairs with them. She told deceased she would like the doctor, or some other person, to witness them, when the old man said, 'No, *Theodore* will do.' They were read again by *Theodore*, the old man was perfectly satisfied, asked for no explanation, he then signed them; this was more than a month after they had been first brought to the house. Dr. *Brandon* used to come at that time about once a

Statement.

1881. week. Never told the doctor that she would like to have him as a witness. Never told him what the agreement was until after the old man died. Was well acquainted with the doctor, and he was the old man's doctor before he came there to live with the defendants. It was further shewn in evidence that no one except the defendant *Theodore*, and the husband of *Isabella*, and herself, knew of the arrangement with the old man until after his death; that the oldest daughter did know, "*but she was not to say anything about it.*" The defendant further stated that she did not know why it was to be kept a secret, he was a man who did as he liked and it would have made no difference if it was known; and that the deed and mortgage were registered. Next day she further said that *Theodore* was a great deal in the old man's company, he waited on him much about this time and after the bargain was made; that the deceased's brother *Francis* came to see him sometime after the bargain was made, but she did not tell him of it, and that she did not know that he came at all after the papers were signed; that Mrs. *House* was a niece of the old man's, she came several times to see him after the bargain was made, but defendant never told her of it either; and that there was a number of respectable neighbours living near but she never told them of the arrangement either.

Statement.

The evidence of the doctor who was in attendance on the deceased during the whole of his last illness, as well as other material evidence given at the hearing, sufficiently appear in the judgment.

The cause came on for examination of witnesses and hearing before the Chancellor, at Hamilton, in December, 1880.

Mr. *Robertson*, Q.C., and Mr. *Boyd*, Q.C., for the plaintiffs.

Mr. *Bruce*, for the infant defendants.

Mr. Osler, Q.C., and Mr. Teetzel, for the defendant *Isabella Young*. 1881.

Irwin
v.
Young.

Mr. Dingwall, for the defendant *Theodore Young* the younger.

The following cases were cited: *Demorest v. Miller* (a), *Gibson v. Russell* (b), *Mason v. Seney* (c), *Griffiths v. Robins* (d), *Dent v. Bennett* (e), *Parfitt v. Lawless* (f), *Archer v. Hudson* (g), *Lyon v. Home* (h), *Dawson v. Dawson* (i), *Rhodes v. Bate* (j), *Harrison v. Guest* (k), *McConnell v. McConnell* (l), *Hunter v. Aikens* (m), *Beman v. Knapp* (n).

SPRAGGE, C.—At the close of the hearing of the case at Hamilton, I gave my view of the facts of the case at considerable length, and, to some extent, my view of the law applicable to it. I desired, before finally disposing of the case, to examine more particularly some of the cases to which I was referred. Judgment.

One point which I wished to consider further and to consult authorities upon, was whether the conveyance impeached by this bill is to be regarded as a gift or a purchase for value, and what bearing the previous offer by the deceased, shortly after going to live at the house of the defendant's husband, should have upon it.

In *Beman v. Knapp* (o), there was a bond by the grantee to the grantor, his father, for providing his father and his mother with support, clothing, and medical attendance during their lives. This, it was observed by the late Vice-Chancellor Mowat, "is claimed

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| (a) 42 U. C. R. 56. | (b) 2 T. & C. C. C. 104. |
| (c) 11 Gr. 447. | (d) 3 Mad. 192. |
| (e) 7 Sim. 539 S. C. on App. | (f) L. R. 2 P. & D. 462. |
| (g) 7 Beav. 551, 4 M. & C. 269. | (h) L. R. 6 Eq. 655. |
| (i) 12 Gr. 278) | (j) L. R. 1 Ch. 252. |
| (k) 6 D. M. & G. 424. | (l) 15 Gr. 20. |
| (m) 3 M. & K. 113. | (n) 13 Gr. 398. |
| (o) 13 Gr. 398. | |

1881. to be a deed for valuable consideration, because of the proviso for the old man's maintenance; but clearly that was not the character of the instrument. The maintenance of the old man would have been an inadequate consideration for the conveyance; but the grantor had no personal security even for his maintenance, nor security of any kind beyond a mere lien for it on the land he was conveying. This lien he reserved, and subject to it the deed was a gift of the land to the grantee."

Irwin
v.
Young.

In *Dent v. Bennett* (b), an agreement had been obtained by a medical man from a person whom he had attended professionally for the payment after his death of £25,000. The agreement recited a promise and agreement by the defendant that "he would, at all times when required, diligently and faithfully give his medical and surgical attendance to his friend *Jonathan Dent* (the deceased), for and during the remainder of his life," and it proceeded, "and the said *Jonathan Dent*, in consideration thereof, and out of gratitude and respect to his friend *Lewis Bennett* (the defendant) for past services, for having saved his life when in the greatest danger, does hereby promise and agree." Then follows an agreement for the payment of £25,000 out of his estate six months after his death. He was then eighty-five years old, and lived some four or five years afterwards. It does not appear that the sum in question was the whole of the deceased's estate. The answer says he was a man of great wealth; and there is nothing in the case indicating the contrary.

Judgment.

Lord *Cottenham* says of this agreement: "As a contract, therefore, for value, the transaction is not extravagantly absurd than any that has come under my notice; and if the case rested upon that, would only require to be stated." In another passage he says: "Notwithstanding the ground of bargain relied

(b) 7 Sim. 539, in App. 4 M. & C. 269.

upon in the answer, I consider that consideration so absolutely nominal * * that the agreement must, I think, be looked upon as purely voluntary, and as a gratuitous reward for past services."

1881.

Irwin
v.
Young.

At the date of the execution of the deed in question in this suit, the 11th of July, it was the undoubting conviction of Dr. *Brandon*, who attended the deceased, that he would die in the autumn; and in fact he died in October: and he communicated this opinion to the defendant. The doctor was asked as to that date and previously, "In May, June, and July, were the Youngs not very much alarmed about it?" His answer is: "I think they understood it then pretty well, and in July they understood it very well."

As a conveyance for value then this case is weaker than the case of *Dent v. Bennett*. Mr. *Dent*, Lord *Cottenham* said, was at the date of the agreement "represented as being in good health." *Robert Irwin* at the time of the execution of this conveyance was a doomed man, with a disease that would run its course in a very few months, and that did bring him to the grave in less than four; and this was known to the grantee in this conveyance.

Judgment.

I do not think that what took place shortly after *Robert Irwin* went to live with the defendant can assist her, assuming that she states it correctly. As she states it, it was a proposal by him to which she did not agree, as she wished, as she says, not to have him bound. Besides, it was not a conveyance, as I infer, that he proposed to make, but if anything, a will. It was a will that was intended when the letter of May was written; and there is this important circumstance, that it does not appear to have been ever put to him that what he was about to do was in pursuance of a previous agreement, nor does a previous agreement find a place among the recited reasons and motives for making the conveyance. There is some evidence that the testator intended to deal liberally with the defen-

1881.

Irwin
v.
Young.

dant, and the letter of May indicates an intention to leave her the farm by will; but such intention will not support a conveyance if made under circumstances which leave the transaction open to the grave objections which exist in this case. I may refer here, without quoting it, to the language of Vice-Chancellor Mowat in *Dawson v. Dawson* (a), and to the American notes to *Huguenin* and *Baseley*, referred to by me in *Lavin v. Lavin* (b).

Judgment.

With regard to the necessity for independent advice. The relative positions of the benefactor and beneficiary (for I must look upon them in that light), and all the surrounding circumstances, must be taken into account. I discussed their position and the surrounding circumstances at some length at the hearing, and thought the conclusion inevitable that the mental and physical condition and the surroundings of the deceased were such that the defendant and her family might, *i. e.*, had it in their power to exercise a controlling influence over the deceased; and that the case was thus brought within the rule so often quoted, that the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another. I thought, and still think, it a case in which the law requires that a man parting with property should have independent advice. It comes within what *Turner*, L. J., in *Rhodes v. Bate* (c), calls the law of the Court.

The books abound with cases in which equity Judges in England and in this country have insisted upon the necessity of independent advice, and have pointed out how and in what respects the interests of parties to agreements and conveyances have failed of being protected for want of it; and in this case Mr. *Boyd* has pointed to several particulars in which the interests of the grantor, *Robert Irwin*, were not provided for by

(a) 12 Gr. 281.

(b) 27 Gr. 573.

(c) L. R. 1 Chy. at p. 262.

the conveyance made to this defendant, or in any way; and which it is to be assumed a professional adviser, or even an intelligent layman, would have explained to the deceased. It cannot be said that in the prospect of death being near at hand, he was indifferent upon these points; for it does not appear certain that even when this conveyance was executed he regarded his case as hopeless; and at an earlier period, after the documents drawn up in Hamilton had been brought to him, he desired time to think the matter over, observing that a man could not be too careful before parting with his property: an evidence this of his careful and cautious nature, and of his desire that in an instrument purporting to give something or provide something for himself in return for what he was giving, what he was to have should be sufficiently provided for. One can scarcely doubt that if he had had the benefit of judicious independent advice, his interests would have been better protected than they were in this transaction.

1881.

Irwin
v.
Young.

Judgment.

Another point which at the hearing I said I desired to consider further, was, as to the evidence by which this transaction was supported.

In *Delong v. Mumford* (a), and in *Lavin v. Lavin* (b), I held, following the case of *Walker v. Smith* (c), that to sustain a gift, the evidence of the recipient is not to be taken into account. According to *Dent v. Bennett* and *Beman v. Knapp*, this conveyance was substantially a gift; but assuming that it does not in strictness belong to that category, it is of a character in which more satisfactory evidence should be given than has been given in this case. The transaction rests for its support almost wholly upon the evidence of the grantee herself, and of her son, who claims to hold the proceeds of a deposit receipt for \$900 given to him, as he says, by the deceased as a compensation for services.

(a) 25 Gr. 586.

(b) 27 Gr. 571.

(c) 29 Beav. at 398.

1881.

Irwin
v.
Young.

The sum so received by the son is not in question in *this suit*, but some evidence in relation to it was given incidentally; and the son gave evidence as to facts tending to support at the same time this gift or compensation to himself and the conveyance to his mother; and he manifested, as was natural, a strong interest in the support of both.

It is upon the evidence of the mother and son alone that we have any explanation as to how the deceased came to make a conveyance after his expressed intention to make a will; as to what he required in the way of future provision for himself; as to the reading of the document; as to its explanation, which, even upon the son's evidence, appears to have been of the most meagre kind; as to how it was that the son was the only witness attesting it: that the doctor was not communicated with on the subject till some time after it was all closed, and then merely informed of the fact, and that so vaguely that he felt himself able to say in his evidence that until the day of the funeral he knew nothing of any documents between the parties. He had said so to *Francis Irwin*, and he said it was true, adding, "suspecting and supposing is not knowing;" adding, also, that he thought there should have been legal advice. The mother and son say that the deceased wished it not to be known abroad that he was making this conveyance, and said that one witness was sufficient. They say that between the time of the bringing of the papers from Hamilton and their execution, the defendant Mrs. Young spoke to the deceased two or three times about them. We have only her own evidence as to what passed upon these occasions. In short, the whole transaction rests upon no other testimony than that of the recipient of this conveyance and her son; and it is to be borne in mind that the grantor was, when in health, a man of less than average intellect; and when this conveyance was executed he was, as the doctor says, weak and low, and would pro-

Judgment.

bably be more easily influenced than when he was stronger, though, as he thinks, he would have resisted if the execution of the conveyance had been pressed upon him and insisted upon.

1881.
Irwin
v.
Young.

I do not say, nor do I think it is to be inferred from the evidence, that any undue influence or pressure was brought to bear upon the deceased, or that he did not understand that he was conveying this farm of his to Mrs. Young, and that he was doing so in return for maintenance and nursing that he was receiving, and was to continue to receive during his life. Nor do I think it at all improbable that he did propose some such arrangement as purports to be carried out, but is very imperfectly carried out by the instrument in question. I say this, looking at the kind of man he is described to have been, and to his relations with others of his family.

The difficulty is, that what is shewn is shewn upon that which is at best unsatisfactory evidence; and in view of the fact that at the time of the execution of this conveyance it was known to the grantee that the grantor was moribund, and the conveyance virtually a gift, and so the evidence of the grantee not to be taken into account, it must rest upon the evidence of the son. And even taking his evidence to be truthful and accurate, and even if the evidence of the grantee were admissible, the difficulty remains, that there was no independent advice, and that the instrument executed was not such as a professional adviser or even an intelligent layman would have advised or allowed to be executed; certainly without ascertaining from the grantor distinctly that it was his free and unbiased wish, and after pointing out to him what in the judgment of his adviser would be proper for his protection. In anything that I have said in this case at the hearing at Hamilton, or now, I do not mean to impute to Mrs. Young fraud, or any moral wrong. I think it by no means improbable that if this conveyance and

Judgment.

1881. its consequences had been fully explained to the deceased by a competent legal adviser, it would not have been repudiated by the deceased, but that the arrangement would have been carried out with some modifications and with better provisions for the protection of the grantor, to which both parties would probably have readily assented.

Irwin
v.
Young.

Judgment.

I incline to think that the defendant has not been dishonest in this matter; but that her failure to establish the conveyance in her favour is due to her not having sufficiently attended to what is the law of this Court with reference to persons standing in the relations in which she and the deceased stood; and I therefore grant relief against her, without costs, as was done by the Lords Justices for the like reason in *Rhodes v. Bate (a)*, and as was done by myself in *Lavin v. Lavin*.

(a) L. R. 1 Chy. 262.

1881.

LOWSON V. CANADA FARMERS' INSURANCE COMPANY.

Fire insurance—Mutual insurance—Ultra vires.

By the statute incorporating an Insurance Company, which was authorized to carry on business on the mutual as well as the proprietary principle, it was enacted that "no mutual insurance shall be effected on * * nor on any kinds of mills, carpenters', or other shops, which by reason of the trade or business followed, are rendered extra hazardous : machinery, breweries, distilleries, tanneries, or other property involved in similar or equal hazard." The company, professing to act under their charter, granted a policy of insurance on a grist, carding and fulling mill, which were all in one building, and the position therein of the picker, it was alleged, rendered the risk extra hazardous. The structure was destroyed by fire. In a suit instituted to compel payment of the insurance, the company raised the defence of *ultra vires*, which the Court [SERAGGE, C.] sustained, and dismissed the bill; but refused the company their costs of suit, as in opposing the plaintiffs' claim they were resisting upon inequitable grounds the payment of a just debt.

This was a suit instituted by *William Lowson, Thomas Hunter Cox, John Leng, and The Dundee Mortgage and Trust Investment Company (Limited)*, against *The Canada Farmers' Mutual Insurance Company*, and *William S. Boyd*, in which the plaintiffs sought to recover from the defendants *The Insurance Company* the amount of a policy of insurance, against loss by fire, for \$4,000, effected by the defendant *Boyd* on the 11th of January, 1877, for the period of three years from the 27th of December, 1876 on the property therein described, being situate in the Province of Quebec, and comprising—(1) A grist mill and fulling mill, the machinery in which was driven by water power, for \$1,875; (2) The machinery in the grist mill for \$812; (3) The machinery in the carding and fulling mill for \$438; (4) The wheel and attachment for \$375; and (5) Gearing and shafting for \$500. The defendant *Boyd* having contracted for a loan of money from the plaintiffs *The Dundee Mortgage and Trust*

Statement.

1881. *Company (Limited)* on the 11th day of July, 1878, executed to the plaintiffs *Lowson, Cox, and Leng*, being directors of such company, and as trustees therefor, a mortgage under the laws of the Province of Quebec, upon the buildings and premises, the subject of the said policy of insurance, as well as the lands whereon the same were situate, conditioned for the repayment of the sum of \$4,107.60 at the times therein mentioned, and thereby also covenanted to pay this amount to such plaintiffs; and concurrently therewith the defendant *Boyd*, by an instrument of the same date, agreed with the plaintiffs *Lowson, Cox, and Leng*, as such trustees, that they should have the right to insure the said premises in their own names, and that all existing policies of Insurance against fire thereon should be assigned by him to such plaintiffs by way of additional security for the amount of his mortgage to them.

The policy in question was accordingly assigned by the defendant *Boyd* to the plaintiffs *Lowson, Cox, and Leng*, on the 15th day of July, 1878, and the defendants *The Insurance Company* duly approved thereof on the thirty-first day of the same month.

The insured property was, on the 21st day of December, 1878, destroyed by fire.

The plaintiffs filed their bill on the 16th of September, 1879, and claimed from the insurance company for loss and damages sustained, payment of the said sum of \$4,000 and interest. The defendants *The Insurance Company*, in their answer, set up as grounds of defence certain breaches of the conditions of the policy; also an alleged settlement by the defendant *Boyd* of the amount of the said loss at the sum of \$2,650, and that the risk under the policy was one which the company had not under its Acts of incorporation power to take, and that the policy was therefore *ultra vires*.

The plaintiffs thereupon amended their bill, stating that the defendants *The Insurance Company* were

authorized by statutes in that behalf to carry on the business of fire insurance generally, and that the policy was under such authority; that the alleged breaches of the condition of the policy had been waived by the defendant company, and that the alleged settlement of the amount of loss with the defendant *Boyd* was not binding upon the plaintiffs or him under the circumstances stated in the judgment.

The cause came on to be heard at the Spring Sittings of 1880, at Toronto.

Mr. Crooks, Q. C., and Mr. Symons, for the plaintiffs.

Mr. Cattanach, for the defendant *Boyd*.

Mr. W. Cassels and Mr. Gibson, for *The Insurance Company*.

The other facts appear in the judgment.

Parsons v. The Citizens' Ins. Co. (a), Mechanics' Ins. Co. v. Gore District Mutual (b), Parsons v. Victoria Mutual Ins. Co. (c), Hopkins v. Manufacturers', &c., Ins. Co. (d), McQueen v. The Phoenix Ins. Co. (e), Canada Landed Credit Co. v. Canada Agricultural Ins. Co. (f), Lampkin v. The Ontario Marine & Fire Ins. Co., (g), Shannon v. The Hastings Mutual Ins. Co. (h), Parsons v. The Standard (i), were referred to by counsel.

SPRAGGE, C.—A leading question in this case is, whether the insurance effected by the defendant *Boyd*, with the defendants the Insurance Company, and assigned by *Boyd* to the plaintiffs, was *ultra vires*.

1881.

Lowson
v.
Canada
Farmers'
Ins. Co.

Sept. 1st,
1880.

(a) 43 U. C. R. 261.

(c) 29 C. P. 22.

(e) 29 C. P. 511; S. C. on App. 4 App. R. 289,

(f) 17 Gr. 418.

(h) 2 App. R. 81.

(b) 3 App. R. 151-8.

(d) 43 U. C. R. 254.

4 App. R. 289,

(g) 12 U. C. R. 575.

(i) 43 U. C. R. 603; S. C.

on App. 4 App. 326.

1881.

Lowson
v.
Canada
Farmers'
Ins. Co.

This company was incorporated by Statute of the late Province of Canada, 14 & 15 Vict. ch. 163. Section 2 of the Act describes the composition of the company dividing the stock into two classes, the one called mutual, and the other proprietary, "the mutual stock being composed of premium notes deposited for the purpose of mutual insurance, together with all payments, and other property received or held thereon, or in consequence of such mutual insurance." The proprietary stock being what its name imports, "for the purpose of fire insurance to others;" and the members of the company were divided into two classes: "those who deposit premium notes for the purpose of mutual insurance denominated mutual members; and proprietary members, or those who hold shares in the proprietary stock of the corporation."

Judgment. Section 15 authorized the company to make and effect contracts of insurance against fire, generally, with any persons whatever, on any houses, stores, or other buildings whatever, upon such terms as might be agreed upon between the company and the insured; then follows section 16, upon which this branch of the case turns. After providing a limit to insurance based upon value, and limiting the amount of insurance upon any one risk, it proceeds thus: "And no mutual insurance, shall be effected on * * * nor on any kinds of mills, carpenters' or other shops, which by reason of the trade or business followed, are rendered extra hazardous; machinery, breweries, distilleries, tanneries, or other property involved in similar or equal hazard."

The Act of incorporation has been amended by subsequent Acts, but the amending Acts do not touch this question. What was insured by the policy granted to *Boyd* by the company was "a Grist, Carding and Fulling Mill," 35 x 55: Machinery in the grist mill, machinery in carding and fulling mill, wheel and attachment, gearing and shafting; separate sums are insured upon each, the aggregate being \$4,000.

Two questions arise upon this branch of the case, 1881.
 one whether the insurance effected by *Boyd*, was
 under sec. 15 of the Act (sec. 2 of the amending Act of
 1868), or under sec. 16 of the Act of Incorporation;
 the other, whether the property insured comes under
 the denomination of "extra hazardous." The grist, card-
 ing and fulling mill, were in the one building, and the
 contention of the company is, that the carding and full-
 ing mill being as they were in one building, and the
 position of the picker, made the risk extra hazardous.

Mr. *Crooks* for the plaintiffs, points out differences
 between this policy and the policies issued to *Boyd* by
 the Niagara Mutual, and the Shefford and Brome Mutual
 Insurance Companies, which are also before me. It does
 certainly appear more distinctly upon the face of these
 two policies that the insurances thereby effected were
 cases of mutual insurance, than it does upon the face
 of the policy in question. But still, upon this policy
 and upon *Boyd's* application for insurance which is
 referred to, in the policy, it does appear with sufficient
 distinctness to leave no doubt in my mind upon the
 subject, that the insurance was applied for, and effected
 upon the principle of mutual insurance. The distinc-
 tions between the two classes of insurance are very
 clearly explained by the learned Judges who decided the
 case of *Ellis v. Beaver and Toronto Mutual Ins. Co. (a)*.

The policy issued to *Boyd* in this case recites that
Boyd "has made application of such a number and date,
 and has given a premium note or undertaking to the
 company for the sum of \$560, * * * and which said
 application is made a part and condition of this
 contract of insurance," and indorsed on the policy is
 the following:—

Sum Insured.	\$4000 00
Undertaking.	560 00
Cash Payment.	84 00
Fees.	1 50

(a) 21 C. P. 84.

Lowson
v.
Canada
Farmer's
Ins. Co.

Judgment.

1881.

Lowson
v.
Canada
Farmers'
Ins. Co.

The three last named sums are indorsed on the application thus :

Premium Note.....	\$560 00	
Fifteen per cent. Premium thereon..	84 00	
Fee.....	1 50	
		<hr/>
		\$85 50

Then turning to the face of the application, we find it headed "Premium Note System," and referring to the Act we find the notes given by the insured in cases of mutual insurance styled indifferently premium notes and deposit notes.

All this appears to me to shew very clearly that the insurance effected by *Boyd*, in this company, was on the mutual insurance principle, and was not such an insurance as was authorized by section 15, (section 2 of the amending Act of 1868), and I say this without referring to the form of the premium note to which Mr. *Cassels* refers me, but which Mr. *Crooks* objects is not in evidence.

Judgment.

The next question is, whether the property insured comes under the denomination of "extra hazardous." There is some evidence both ways, but the weight of evidence certainly is, that this was an extra hazardous risk, taking into account the fact of a grist mill, and carding and fulling mill being in the one building, and the position of the "picker" adding to the risk.

If this be so, as the evidence, in my opinion, shews it to be, this contract of insurance was a contract which is expressly forbidden by the Act, and therefore *ultra vires*, and if *ultra vires*, absolutely void. Upon this point I cannot do better than quote the language of Lord Cairns in the *Ashbury Railway Carriage and Iron Co. v. Riche* (a): "Now, I am clearly of opinion that this contract was entirely as I have said, beyond the objects in the memorandum of association. If so, it

(a) 7 E. & I. App. at p. 672.

was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified, or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'that is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now."

And his Lordship refers with approbation to the following passage in the judgment of Mr. *Justice Blackburn*, in the same case in the Exchequer Chamber: (a) "I do not entertain any doubt that if on the true construction of a statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract; every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment, as illegal, and therefore wholly void, and to hold that a contract wholly void, cannot be ratified."

1881.

Lowson
v.
Canada
Farmers'
Ins. Co.

Judgment.

All the law Lords who gave judgment in the case agreed, that a contract which is *ultra vires* is absolutely void, and as to ratification, they say that if capable of ratification it could only be by every individual shareholder. I confess myself unable to see how it could be ratified, even if every shareholder concurred in its ratification, the argument seems irresistible that they could not ratify a contract which they could not make.

Davis's Case in 12 Eq. (b) is a strong case as to the effect, or rather absence of effect of an Act *ultra vires*. The directors of a building society had power to borrow money "for the purposes of the society." The

(a) At p. 673.

(b) p. 516.

1881. directors did borrow money, but not for such purposes of the society as were stated in its certified rules; and Sir James *Bacon* held that the lender had no *locus standi* in Court.

LOWSON
v.
Canada
Farmers'
Ins. Co.

The case in the House of Lords is conclusive upon the question of ratification, as well as upon the effect of an Act *ultra vires*; and I cannot hold the company estopped by conduct from shewing that their act was *ultra vires*. In the case in the Lords the Act which was declared to be *ultra vires*, had been ratified at a general meeting of the shareholders.

Judgment. The point that I have dealt with goes to the very root of the plaintiff's case, and makes it unnecessary for me to make any disposition of the other points in the case. I should have been well pleased to have been able to come to a different conclusion upon the question upon which I decide the case, for the defendants, the Insurance Company, in opposing the plaintiff's claim, are resisting, upon inequitable grounds, the payment of a just debt. I should not say this if the evidence, which was taken before myself, did not lead me to that conclusion.

I shall therefore do what was done by L. J. *Giffard*, in *Re National Permanent Benefit Building Society* (a), a case not unlike this in principle, refuse the company their costs. The defendant *Boyd* also ought not to have his costs.

The bill is dismissed, without costs.

(a) L. R. 5 Chy. 309.

1881.

DICKSON V. McMURRAY.

Joint stock company—Election of directors—Scrutineers.

At a meeting of the shareholders of a company, the capital stock of which was held by a few, a chairman was elected by a majority of the votes of those present, without regard to the stock held by them. Two of the shareholders, who were also provisional directors, and who were candidates for re-election, were appointed scrutineers in the same manner, and directors were then elected, excluding the plaintiff. The plaintiff was president of the company, and held a large amount of stock, sufficient with that held by those who were favourable to him to have controlled the vote if it had been taken according to shares. It was the duty of the scrutineers to decide as to what votes were valid, and they also, with the aid of legal advice, interpreted an instrument under which the plaintiff had advanced a large sum of money to start the company, and which provided for the future disposition of the shares of the company held by the plaintiff as a security for his advances, and allowed certain persons to vote as being *cestui que trusts* of a portion of such shares.

Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate that they were disqualified from so acting, and the election was set aside, and a new election ordered, with costs to be paid by the defendant.

This was a bill by *John Geale Dickson*, who sued on behalf of himself and others the shareholders of The Mount Hope (High Park) Cemetery Company (limited), other than the defendants, against *James Saurin McMurray, Robert Beaty, Charles James Campbell, William Hope, William A. Lee, James Boyd Davis, William Barclay McMurrich, William Bain Scarth, William Fahey*, and the said Cemetery Company, praying under the circumstances appearing in the judgment that it might be declared that the appointment of the defendant, *McMurrich* as chairman, at a meeting of the shareholders was illegal; that the appointment of *William, Hope* and *Robert Beaty*, as scrutineers was illegal; and that the defendants *McMurray, Beaty, Hope, Lee, Davis, McMurrich, Scarth*, and *Fahey* had not been duly elected directors of the company, and

Statement.

1881.
 {
 Dickson
 v.
 McMurray.

that the same might be set aside ; that the said defendants might be restrained from interfering in any way with the management of the said company and for other relief.

The plaintiff gave notice of motion for injunction which by arrangement was turned into a motion for decree.

Mr. *W. Cassels* and Mr. *G. T. Blackstock*, for the plaintiff.

Mr. *Maclennan*, Q.C., and Mr. *Huson Murray*, for the defendant, *McMurray*.

Re Bartley (a), Re Wilcox (b), Pender v. Lushington (c), Hill v. The Bishop of London (d), Martin v. Martin (e), Briggs v. Sharpe (f), Attorney-General v. Parker (g), Re Shrewsbury School (h), Amherst v. Dowling (i), Angell and Ames on Corporations, secs. 131, 142; Field on Corporations, sec. 233, were referred to.

Judgment.

PROUDFOOT, V.C.—On the 6th July, 1880, an agreement was entered into between the plaintiff of the first part, *McMurray* of the second, *Searth* of the third, and *Smith* of the fourth part, reciting that it had been agreed between these parties that the plaintiff should purchase certain land for \$8,750, advancing the purchase money himself and taking the conveyance to himself alone, free of any trust appearing thereon; that plaintiff had paid the money and taken the conveyance to himself alone; that the lands were purchased with a view of reselling to a cemetery company, or otherwise, at an enhanced price; that the

(a) 6 Wendell 510.

(c) L. R. 6 Ch. D. 70.

(e) 12 Sim. 587.

(g) 3 Atk. 577.

(b) 7 Cow. 401.

(d) 1 Atk. 618.

(f) L. R. 20 Eq. 317.

(h) 1 M. & C. 348.

(i) 2 Vern. 401.

1881.

Dickson
v.
McMurray.

plaintiff, with the consent of the others, had agreed with certain persons who had applied for a charter under the name of the Mount Hope High Park Cemetery Co., to sell the land to them for 1087 shares, each of the nominal value of \$100, of the capital stock of the company, and to be deemed and treated as paid up stock; that plaintiff had already expended \$1,222.25 for expenses, which, with the purchase money, made a total of \$9,972.25, which was to be deemed and treated as a settled account and as a principal sum due to the plaintiff, and to bear interest till paid at the rate of 8 per cent. per annum; that, by deed of 28th June, 1880, the plaintiff, with the consent of the other parties, conveyed the premises to *Campbell, McMurray, Hope, and Beaty*, their heirs and assigns, on the following trusts: To hold the same till the letters patent issued or were refused; and after issue of patent to convey to the company, or, in the event of the refusal of a patent, to convey to plaintiff free from incumbrances.

Judgment.

It was agreed that the plaintiff should hold the 1087 shares when he should become possessed of them, upon trust to retain the same and receive all dividends and income till he was repaid the sum of \$9,972.25 and interest, and taxes, costs, &c., and after he shall have been repaid, to transfer five of the paid-up shares to each of ten persons named, and to divide the remainder of the shares into four equal parts and to assign one to *McMurray*, one to *Scarth*, and one to *Smith*, and to retain one to himself; or, if the lands were reconveyed to the plaintiff, to sell the same and to hold the price received—first, to pay himself principal, interest, and advances and expenses, and then to divide the balance among the same parties—*McMurray, Scarth, Smith*, and plaintiff.

And these three, *McMurray, Scarth, and Smith*, each covenanted to pay one-fourth of the disbursements and one-fourth of the interest on the said principal on the 7th of July and January in each year.

1881.
Dickson
v.
McMurray.

It was further recited that negotiations were pending for a loan from the plaintiff, and if that were obtained it should not be considered a disbursement, but as a distinct and independent transaction.

Letters patent were issued on the 22nd July, 1880, incorporating the plaintiff and twelve others, and such other persons, &c., a cemetery company, directing the capital to consist of 1,100 shares of \$100 each, and appointing the plaintiff and eight others the first directors.

On the 14th September, 1880, *Campbell, McMurray, Hope, and Beaty* conveyed the land to the cemetery company.

The directors named in the patent elected the plaintiff president of the company, and a stock certificate was duly issued to the plaintiff as the owner of 1,087 fully paid-up shares, and one share with ten per cent. paid, and others on which different sums were paid, were issued to the directors of the corporation.

Judgment. It seems that the negotiations for a loan from the plaintiff fell through, and he declined, as president, to execute a mortgage for a loan in lieu of it, which would have placed the mortgagee in priority to his claim, and as it was apprehended a contest would arise at an approaching meeting for election of directors, the plaintiff absolutely transferred two paid-up shares to each of eight persons, thus leaving him the owner on the stock book of 1,071 shares.

The meeting took place on the 17th January, 1881, when the first struggle was as to the appointment of chairman. The plaintiff thought he was entitled to act as chairman, being the president, but a majority of two of the shareholders present determined otherwise, and voted another person into the chair. The vote was taken, not by shares, but by counting noses, as one witness termed it; a proceeding protested against by the minority.

The next subject of contention was the appointment

1881.

Dickson
v.
McMurray.

of scrutineers. A resolution was proposed by the defendant, that *Beaty* and *Hope* should be scrutineers. An amendment to this was proposed that *Jameson* and *Cassells* be scrutineers. This was defeated and *Beaty* and *Hope* were appointed. This vote also was taken, not by shares, but by the number of the shareholders.

The election was then proceeded with, when *McMurray*, *Scarth*, and *Smith* claimed to vote as *cestuis que trust* on one-fourth of the shares held by the plaintiff. Their right to do so was questioned, but it was held by the scrutineers that they had this right; and the result of the ballot was declared to be the election of the former board, with the exception of the plaintiff.

The election is objected to upon a number of grounds, including those mentioned above, but I do not think it necessary to determine any of them except one as to the qualification of the scrutineers. *Beaty* and *Hope*, the scrutineers, were at the time directors of the company, and they were named on the ballots as candidates for re-election. As scrutineers they had to determine what votes they would receive or that were entitled to be cast. Their duty was to some extent a judicial one. It was not merely ministerial, for, if so, they would have received or given effect to the vote of the plaintiff on his 1,071 shares, while they only allowed him to vote on 271 shares, a vote that would have overcome those on the opposite side. They also determined, it must be assumed judicially, that they were not bound to regulate the votes by the stock book, which would have been equally decisive in favour of the plaintiff's contention, but deemed themselves at liberty, and bound, to peruse and construe, under the advice of counsel, the agreement of 6th July, 1880, and to decide that there was a present trust for the benefit of *McMurray*, *Scarth*, and *Smith*, and also to determine that these *cestuis que trust* were entitled to vote in respect of the shares so held in trust.

Judgment



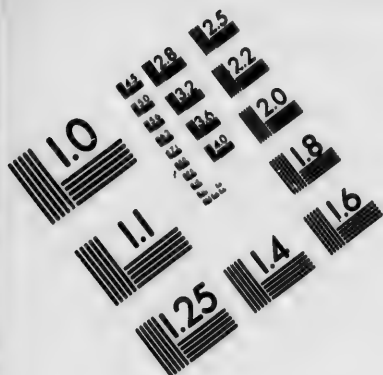
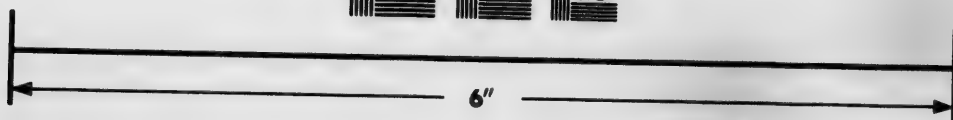
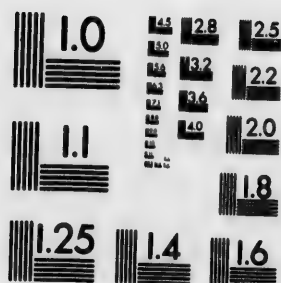


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1881.
Dickson
v.
McMurray.

All these are important questions, and involve no small amount of uncertainty, as the argument in this case witnesses, and upon their decision depended not only whether the plaintiff should be elected, but whether the scrutineers themselves should be elected.

The statement of the case is sufficient to shew that there could be no plainer instance of conflict between interest and duty, and therefore the election of the defendants must be set aside.

I do not go on to declare the plaintiff's directors duly elected, as I decide nothing at present but that the election was not valid because of the disqualification of the scrutineers, and there has been no legal ascertainment of the votes; and there will require to be a new election.

As at present advised, I do not think that shareholders are, in that character alone, incapable of being scrutineers, and indeed the plaintiff could not and does not object to them on that ground, as the scrutineers he favoured were also shareholders, though it would certainly be better that persons outside a company consisting of so few members as this one should be chosen. But the objection is, that they were directors, and candidates for election as directors, which placed them in a position that might affect their impartiality.

The objection to the election of the scrutineers seems to be sufficiently raised on the pleadings, and the plaintiff is therefore entitled to his costs.

I hope that the parties may find some mode of adjusting their differences, that do not appear to be irreconcilable, and thus terminating litigation that must be injurious to them.

1881.

ALLAN V. MCTAVISH.

*Fraudulent conveyance—Evidence—Res judicata—Ancient document—
Statute of Elizabeth.*

D., the purchaser of land, gave a mortgage thereon to secure part of the purchase money, and subsequently allowed taxes to accumulate on the land, which was sold in order to realize such taxes, when *D.* bought it and obtained the usual deed to himself. *D.* having made default in payment of the mortgage, proceedings at law were instituted thereon, pending which *D.* conveyed this and other property to his two sons, who gave a mortgage back securing the support and maintenance of *D.* and his wife, and the plaintiff, after recovering judgment, filed a bill impeaching the transaction for fraud.

Held, (1) that upon the evidence the transaction was fraudulent and void as against creditors; (2) that though ordinarily the production of the exemplification of a judgment at law, is admissible, and has been generally received as evidence of a debt due the plaintiff against all parties in suits under the Statute of Elizabeth, yet that the judgment so recovered by the plaintiff against *D.* was not evidence against the sons, being *res inter alios judicata*; but (3) that the production of the original mortgage signed by *D.* which was more than twenty years old, proved itself under R. S. O. ch. 109, sec. 1, sub-sec. 1, which makes such a document evidence of the truth of the recitals contained therein until shewn to be untrue; and therefore it was evidence of the debt due thereunder, and could be used as such against the sons.

This was a suit instituted by the plaintiff, who was Statement.
a judgment creditor of the defendant *Dugald McTavish*, to set aside a deed of certain lands from *Dugald McTavish* to his sons *Donald* and *Hugh McTavish*, who with their mother *Catharine McTavish*, their brother *Peter McTavish*, and their sister *Euphemia Kennedy*, were also made defendants. The circumstances giving rise to the suit are sufficiently stated in the judgment. The cause came on for the examination of witnesses and hearing at the sittings of the Court at Hamilton, in the autumn of 1880.

Mr. *W. Cassels* and Mr. *A. Galt*, for the plaintiff.

1881. Mr. Osler, Q.C., for the defendants *Hugh McTavish*
and *Donald McTavish*.

Allen
v.
McTavish.

Mr. Laidlaw, for the defendants *Dugald McTavish*
and wife.

Mr. G. E. Patterson, for the other defendants.

Argument.

For the plaintiff it was contended that the arrangement between the father and his sons *Donald* and *Hugh* could not be permitted to stand; the provision made by the mortgage given by the sons as the consideration for the conveyance to themselves was purely voluntary, at least as far as the wife was concerned, and *Dugald McTavish* was not in a position at that time to execute such a document, and there was no evidence to establish that either the defendant *Peter* or *Euphemia* gave any consideration for the provision made in favour of them; that the result, and in case it might be assumed that the object and intent of the arrangement, had been to defeat creditors. There was in fact nothing left upon which the creditors of *Dugald* could seize under an execution at law; for although an annual allowance was secured to him and his wife, that according to the decision in *Fisken v. Brooke* (a), was not exigible; and no evidence whatever was adduced to shew that any agreement had ever been entered into between the father and sons for allowing them wages for their services about the place, so that according to *Douglas v. Ward* (b), no *bond fide* consideration could be raised in respect of them, and the deed could not stand: and that the mere statement now by the father that he always expected to pay wages, was not sufficient: *Campbell v. Chapman* (c), *Masuret v. Mitchell* (d), *Carradice v. Currie* (e), *Irwin*

(a) 4 App. R. 8.

(c) 26 Gr. 240.

(e) 19 Gr. 108.

(b) 11 Gr. 39.

(d) 26 Gr. 435.

v. Freeman (a), Cornish v. Clarke (b), were also referred to. 1881.

Allen
v.
McTavish.

For the defendants it was submitted there was a total absence of any intended fraud. *Dugald* did not divest himself of all his property, he retained certain chattels and also the privilege of building on the Acton lot; this of itself negatives fraud, and on the whole it must be looked upon as a most reasonable family settlement, and all parties believed there was not any debt existing at the time of entering into it: *Gale v. Williamson (c)*, *Townend v. Toker (d)*, *Persse v. Persse (e)*, *Townsend v. Westacott (f)*, *Thompson v. Webster (g)*, *Delesdernier v. Burton (h)*, *Currie v. Gillespie (i)*.

SPRAGGE, C.—The defendant *Dugald McTavish* is the husband of the defendant *Catharine McTavish*, and the father of the other defendants. Mar. 19th.

If in 1872, when *Dugald* made the conveyances to his sons *Donald* and *Hugh* respectively; and when mortgages on the properties conveyed were made by the sons to *Dugald* and his wife, the defendant *Catharine McTavish*, the debt to *Arnold* upon which the plaintiff has recovered judgment had had no existence, the arrangement carried out by these conveyances and mortgages would have appeared to me as reasonable and sensible an arrangement as could well be made, looking at the ages of *Dugald* and his wife and the condition of the family. Judgment.

On the other hand it was such an arrangement as could not be supported if made by a man largely indebted, or if made in order to defeat or hinder a particular creditor. So far as *Catharine* and *Peter* and

(a) 13 Gr. 465.

(c) 8 M. & W. 405.

(e) 7 Cl. & F. 279.

(g) 4 Dr. 628.

(i) 21 Gr. 267.

(b) L. R. 14 Eq. 184.

(d) L. R. 1 Ch. 446.

(f) 2 Beav. 340.

(h) 12 Gr. 569.

1881. the daughter *Euphemia* were concerned it was voluntary, and so far as it was by way of compensation for the past services of *Donald* and *Hugh* it would be held to be voluntary under *Douglas v. Ward* (a).

Allan
v.
McTavish.

At the date of this transaction there was a balance due to *Arnold*, on the purchase of the Acton village lot for principal and interest, of about \$280. There were some other debts, not large in amount, and these it is alleged *Donald* and *Hugh* between them were to pay. The evidence shews that all the parties to the arrangement, and *Catharine* and *Peter* and *Euphemia* also knew that the purchase money of the Acton lot had not been all paid; and *Donald* and *Hugh* knew that only the first instalment had been paid. It does not appear to have been part of the arrangement that they should pay the balance. Before that date, i. e., on the 3rd May, 1869, *Dugald* the father, who had allowed the taxes to fall into arrear and had purchased at a sale for arrears of taxes, obtained a conveyance from the warden and treasurer of the county, of the Acton lot. His excuse was and is that he had got no deed from *Arnold*, and he denies now or rather continues to deny that he executed the mortgage to *Arnold* to secure the balance of purchase money, upon the covenant in which, the plaintiff's judgment was recovered.

Judgment.

It is very clear that the debt on the covenant was not extinguished by the tax sale and conveyance thereupon. Their idea that there was no subsisting debt must have rested upon their belief that there was no mortgage and therefore no covenant, or upon their opinion of the effect of the tax sale and conveyance, or possibly upon both. *Dugald* still kept the Acton lot and there is a provision in one of the mortgages about the fencing of it. The dealings of the *McTavishes* about the Acton lot was simply dishonest.

Assuming for a moment that they really, though

(a) 11 Gr. 139.

mistakenly supposed that the debt, for the purchase of the Acton lot had been in some way got rid of, can they be admitted to say this; and make this mistaken opinion of theirs a reason for supporting a conveyance which withdraws from a creditor property exigible for the payment of his debt? It would be giving a strange effect to mistake, to enable a party thereby to place himself in a better position than if he had made no mistake. I am not satisfied indeed as to *Dugald's* belief that the debt was extinguished; I incline to think that he did not feel safe about it, and that doubt about his position had something to do with the arrangement of 1872. But however that may be, he and his sons and his wife and daughter also knew that such debt had been contracted and that it had not been paid, and I must look at the matter as it really was, namely, that it was still a subsisting debt.

It is under these circumstances that *Dugald* divests himself of all his property real and personal with some exceptions. A paper is produced dated 1st December, 1873, being a receipt for \$10 in full for all stock, crops, and implements of husbandry belonging to him at the date of his conveyances to *Donald* and *Hugh*, with the exception of two milch cows, four sheep, and one horse, mentioned in the mortgage by his sons. There was also excepted as belonging to *Peter* one colt and one young heifer, all the rest he assigned formally to *Donald* and *Hugh*. I do not understand from this paper that *Dugald* retained this stock, crops, and implements, up to its date, for he speaks of them as belonging to him then, but at an earlier date, the date of his conveyances. The sum that he received at the date of the paper could not be the price of what he then assigned, but only a sum which was the balance in full for the stock, crops, and implements, which he then assigned. What he retained for himself were two milch cows, four sheep, and one horse. I have no evidence of their value. Probably \$150 would be the outside

1881.
Allan
v.
McTavish.

Judgment.

1881. value. His retaining these, and I suppose some furniture is some evidence tending to negative an intent to defeat his creditor Mr. *Arnold*. These things were however to be kept on the premises along with the stock of his sons. The particular things were not identified, nor distinguished from the other cows, sheep, and horses, kept on the farm by his sons; so that it would be very difficult for a creditor to realize in execution any thing as the chattels of *Dugald*. What was withdrawn from the reach of his creditors was tangible; what was reserved would be reached with difficulty, if at all. I can come to no other conclusion than that what was done, was a hindering and delaying of creditors; of *Arnold* certainly, and of others if not paid by the sons, and as that was the necessary effect of what was done, I must hold that it was done with that intent.

Catharine the wife of *Dugald* and *Peter* and *Euphemia* his children were volunteers, and if the transaction is void under the Statue of Elizabeth, their interest may be reached in this Court. If not void as against the grantees it may be doubtful whether the interest of the volunteers can be reached: *Fisken v. Brooke* (a); but I incline to think that it may, as they are mere appointees of *Dugald* the grantor. It is inevidence that *Peter* and *Euphemia* have been paid what was under the mortgages to be paid either to them or to *Dugald* and his wife.

To come to the mortgages of 1878. *Dugald* and his wife released the mortgages of 1872, and took in lieu thereof a mortgage from *Donald* and a mortgage from *Hugh*, each to *Catharine McTavish* alone. In the mortgage from *Donald* the proviso is to pay to the mortgagee or to *Euphemia* \$300; and the proviso in that mortgage and in that by *Hugh* is for the payment of \$50 a year, and for the providing a large number of

(a) 4 Appeal, 8.

things therein enumerated for her sustenance and comfort.

1881.

—
Allan
v.
McTavish.

It is beyond doubt, and indeed is scarcely denied, that the change from the mortgages of 1872 to those of 1878, was made for the purpose of defeating the plaintiff's claim. The action was then pending, and a verdict upon which the judgment now proceeded upon, was recovered, was rendered, as appears by a letter from the defendant's solicitor, just one week before the date of the mortgages. The wife is, as she was under the previous mortgages, a volunteer, the appointee of her husband; and even if the conveyances to *Donald* and *Hugh* were unimpeachable, the creditor is entitled to receive from them, such money payments as are by the mortgages of 1878 made payable to her; and an equivalent in money for that which in other shapes she is thereby entitled to receive: *French v. French* (a).

There remains the difficulty upon the question raised by Mr. *Osler*, that the judgment recovered by the plaintiff against *Dugald* is not evidence against *Donald* and *Hugh*, or the parties taking benefits under the mortgages. The plaintiff rested his case in the first place upon the judgment and upon what is therein disclosed as the cause of action namely a covenant dated on or about the 24th of November, 1856, by *Dugald McTavish* to pay to *John Arnold* or his assigns £50 5 0 with interest, by instalments the last of which was payable in 1860. This is *res judicata* as to *Dugald McTavish*, but it is objected that it is not so, and that it is not evidence at all against the other defendants, they not being parties or privies. The point is lucidly explained by Mr. *Best* in his book on Evidence (b). After treating of what he styles the substantive portion of a judicial record to which as he says: "Unerring verity is attributed by the law," he says: "In the judi-

Judgment.

(a) 6 D. M. & G. 95.

(b) 6 Ed. 998.

1881. *cial* portion, on the contrary the Court expresses its judgment or opinion on the matter in question, and in forming that opinion it is bound to have regard, only to the evidence and arguments adduced before it by the respective parties to the proceeding, either of whom may, in most cases, appeal from such judgment, to that of a superior tribunal. Such a judgment, therefore, with respect to any third person who was neither party nor privy to the proceeding in which it was pronounced, is only *res inter alios judicata*: and hence the rule, that it does not bind, and is not in general evidence, against any one who was not such party or privy;" and a little further on (p. 1003), "in order that the maxim *res judicata* shall apply there must be *eadem conditio personarum*." Mr. *Taylor* states the rule in much the same terms, secs. 1495-1498 and Mr. *Phillips* says (p. 515): "It seems obviously unjust that proceedings should be evidence against a stranger inasmuch as he had no opportunity of calling witnesses or of cross-examining those on the other side, or of appealing against the judgment."

Judgment.

Some of the American Courts have indeed, while admitting the maxim as a general rule, made an exception in cases under the Statute of Elizabeth. Cases upon this point are collected in *Bigelow* on Estoppel, p. 81, in *Freeman* on Judgments, s. 418, and in *Bump* on Fraudulent Conveyances, p. 538 *et seq.* I have examined these cases and am not convinced by the reasoning upon which they proceed; and I do not find any English authorities for treating a suit under the Statute of Elizabeth as an exception to the general rule; nor do I see how in reason it can be an exception. This case may be taken as an example if we put out of view the suspicious circumstances to which I have referred. Apart from these the case stands thus: a conveyance is made in 1872, for which a valuable consideration was to be paid, not the full value of the land, but still a substantial consideration, in money

1881.

Allen
v.
McTavish.

and in equivalents for money. Some six years afterwards a judgment is recovered against the grantor by a stranger, upon an alleged covenant, and in an action to which the grantee is no party. How can it be reasonably taken as adjudged against him, that the alleged covenant was entered into by his grantor? Strictly, if it is *res judicata* against him, it is not only evidence but incontrovertible evidence. Some of the American cases have gone that length in cases which seem to me to be very unreasonable; others have treated a judgment recovered as a sort of makeweight, and have held the judgment and some evidence of the debt upon which it was founded as together evidence against the grantee of the debtor.

In practice certainly the exemplification of judgment has been produced, I think ordinarily, as proof against all parties, or at least as admissible evidence against all parties of the debt due to the plaintiff, and has been received generally in suits under the Statute of Elizabeth, and I inclined at the hearing of this cause to think that it was admissible evidence. But the question being pointedly raised by Mr. Osler, I have examined it, and have come to the conclusion that it is not admissible.

But Mr. Cassels in his reply on the hearing contended that the paper purporting to be a mortgage from *Dugald McTavish to Arnold*, produced as it was from the custody of the plaintiff, proves itself as an ancient writing, and he referred me to ch. 109 of the R. S. O. And it does appear to me that the 2nd sec. of the Act taken in connection with the 1st meets the defendants' objection. The first clause of sec. 2 provides that in suits at law or in equity it shall not be necessary to produce any evidence, which by the first sec. of the act is dispensed with, as between vendor and purchaser; and the 2nd clause provides that the evidence declared in sec. 1 to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of suits at law and in equity. Then turn-

1881.

Allan
 v.
 McTavish.

ing to sec. 1 this is provided : "Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments * * twenty years old at the date of the contract, shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions."

An instrument purporting to be over twenty years old is produced. It purports to be a mortgage from *Dugald McTavish* to *John Arnold*. In evidence of its age is not its date only, 1856, but the fact shewn in evidence that there were dealings of that date, between those parties, in respect of which such an instrument securing the sum of money therein purporting to be secured, and containing such covenant for payment of that money as therein contained would be proper. I conclude therefore that this paper, produced as it is by the plaintiff, who was assignee of *John Arnold*, is of the age it purports to be. If upon a contract between vendor and purchaser this instrument were produced with such evidence of its age as I have before me, that would be sufficient to authenticate the instrument as a genuine document, and being so, it is by sec. 2 made evidence in this suit.

Judgment.

It is true it is made *prima facie* evidence only, and its execution is denied by *Dugald*, in his evidence at the hearing upon his oath. The subscribing witness to the receipt at the foot of the mortgage is dead. I am obliged to say that I do not credit this denial by *Dugald*. In his answer there is no positive denial, but only upon recollection and belief. At the hearing he gave his evidence in a way that led me to think more of his intelligence than of his truthfulness; and he evinced strong feeling in favour of the defendants and evident desire to support their case. I have before me five papers containing seven signatures of *Dugald* produced from the custody of the defendants and therefore confessedly genuine, though they do, as was

natural, vary somewhat. I have also a conveyance from him to a third person with two signatures proved to be his. A comparison of these signatures with the signatures denied by him to be his, does in my judgment altogether outweigh his denial. My conclusion upon that point is, that the mortgage containing the covenant upon which the plaintiff's judgment was recovered, was executed by *Dugald*.

1881.

Allen
v.
McTavish.

At the hearing Mr. *Oster* applied on behalf of the defendants *Donald* and *Hugh McTavish*, for leave to file a supplemental answer, setting up that there was no assignment to the plaintiff, by *Arnold* of the mortgage in question. If there could be any danger of these defendants being in any way troubled by the representatives of *Arnold*, who is dead, there might be some reason for the application, but there can be no such danger. There is reason upon the evidence to believe in the existence of an assignment, either of this mortgage by itself, or of several securities, including this mortgage. It appears clearly enough upon the evidence that the plaintiff was entitled to such assignment. The only effect of granting this application would be to embarrass the plaintiff by a difficulty which is beside the merits of the case. I therefore do not grant it.

Judgment.

The point perhaps most free from question in this suit as to what the plaintiff is entitled to, is that which *Catharine* is entitled to under the mortgages of 1878. I am however also of opinion that the transactions of 1872 are successfully impeached; and that the plaintiff is entitled to the usual remedy under the statute in respect of them.

The decree will be with costs as against *Dugald*, *Donald*, and *Hugh*, and without costs as against *Catharine*, *Peter*, and *Euphemia*.

1881.

HOLTBY V. WILKINSON.

Will, construction of—Vested remainder—Falsa demonstratio.

A testator devised certain real estate "to be owned, possessed, and inherited by my wife during her natural life subject to the further provisions of my will," followed by a devise to "W. G. when he is of the age of twenty-three years, two hundred acres, or if sold before he arrives at the years mentioned, that some other lot of land or money amounting in value to the above mentioned lot be given him in lieu thereof."

Held, that the wife took a life estate with a vested remainder over to W. G., and the testator having shortly before the date of his will contracted for the sale of the land so devised, that the estate of W. G., who died during the life of the widow, and before he had attained twenty-three, was entitled to the proceeds of such sale.

Held, also, that "two hundred acres of land, the west half of lot No. 14" was *falsa demonstratio* of the west half; the testator having referred to the whole lot as being two hundred acres in a subsequent part of the will.

Statement. This was a suit by the executors for the construction of the will of the late *Robert Gardner*, who died in the month of November, 1880. It was admitted at the hearing of the cause that *Walter Gardner* in the will named was illegitimate and had died unmarried, having made a will appointing as executor the defendant *Wilkinson*, and that the testator owned only the one lot of two hundred acres in the township of Amaranth, and that he died without having any children; that the west portion of the lot was that on which the improvements had been effected, while the eastern portion remained pretty nearly in a wild state.

Mr. *Morphy*, for the plaintiffs.

Mr. *Mulock* and Mr. *Milligan*, for the defendant *Wilkinson*.

Mr. *Plumb*, for the infant defendants.

Mr. *Fleming*, for the other defendants against whom the bill had been taken *pro confesso*. 1881.

Holtby
v.
Wilkinson.

Boraston's case (a), *Marcon v. Alling* (b), and cases referred to therein; *May v. Wood* (c), *Goodtitle v. Whitby* (d), *Bigelow v. Bigelow* (e), *Booth v. Booth* (f), *Phipps v. Akers* (g), *Walker v. Mower* (h), *Re The Montreal Bank* and Imperial statute (i), *Hopwood v. Hopwood* (j), *Nolan v. Fox* (k), *Ferrie v. Wright* (l), *Ellis v. Waddell* (m), *O'Day v. Black* (n), *Festing v. Allen* (o), *Jull v. Jacobs* (p), *Jarman on Wills*, 3rd ed. pp. 386, 758, 764, 765, 769, 773; *Tudor's Real Pro. Cases*, 882; *Hawkins on Wills*, 254, were referred to.

SPRAGGE, C.—The will that is before me for construction in this suit is that of *Robert Gardner*, and bears date 18th October, 1870. The testator died in the following month. The will was drawn up by a niece of the testator from his dictation, he being at the time ill of the disease, typhoid fever, of which he died. After directing payment of his debts, the will proceeds thus: "I will and bequeath that all my property, real or personal, that is to say, real estate or personal property, be owned, possessed, and inherited by my wife *Mariette Gardner*, during her natural life, subject to the further provisions of this my will, so that all claims set forth, or hereafter mentioned, be paid by her out of the property willed to her by me, or that she make good all the claims to the different parties or objects hereinafter mentioned of either real estate or personal property, or in any wise in this my last will.

Feb. 2nd.

Judgment.

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| (a) 3 Rep. 19. | (b) 5 Gr. 562. |
| (c) 3 B. C. C. 471. | (d) 1 Burr. 238. |
| (e) 19 Gr. 549. | (f) 4 Ves. 399. |
| (g) 9 Cl. & F. 583. | (h) 16 Beav. 365. |
| (i) 26 Gr. 420. | (j) 22 Beav. 488. |
| (k) 15 U. C. C. P. 565. | (l) 20 U. C. R. 644. |
| (m) 5 O. S. 639. | (n) 31 U. C. R. 38. |
| (o) 12 M. & W. 279. | (p) L. R. 3 Ch. D. 703. |

1881. I will and bequeath to *Walter Gardner*, the adopted boy, that when he is of the age of twenty-three years, two hundred acres of land, the west half of lot No. fourteen, eighth concession, township of Amaranth, Co. of Wellington; or, if sold before he arrives at the years mentioned in this will, that some other plot of land, or money amounting in value to the above mentioned lot, be given him in lieu of said lot."

Holtby
v.
Wilkinson.

In a subsequent part of the will he enumerates what he calls "the different properties or estates of which I hold as being my real estates," and among them, "lot No. fourteen, being two hundred acres, eighth concession, township of Amaranth, Co. of Wellington." And he proceeds, "I will and bequeath that my whole estate (after the death of my wife, which she is only to enjoy the benefits accruing therefrom while she lives,) be equally divided between my brothers, *Luke Gardner's*, *Joseph Gardner's*, *Mrs. Catharine Watkins's*, and my deceased sister *Mrs. Sarah Hutchinson's* children or their heirs; should no heirs of any of the above be alive, that it go to the next in heirship. I will and bequeath the use of house and garden on the south-east corner of lot No. five, first concession, west, Toronto township, county of Peel, to *Ann McQueen*, during her natural life."

Judgment.

"I will and bequeath that my executors and executrix have the power to dispose of the property if they think proper," and he appoints the plaintiffs to be "the executors and executrix to carry this my last will and testimony into effect."

On the 1st of May next before the date of the will the testator had contracted in writing with one *Hugh Smith*, to sell to him the west half of lot 14, the lot mentioned in the devise to *Walter Gardner*, for \$900, payable by instalments, the first of which was to accrue due 1st May, 1871.

The testator had no children, he had adopted *Walter Gardner* (who was or was supposed to be illegitimate,)

when he was an infant. *Walter Gardner* survived the testator, and attained his majority and made a will; his executor is made a party. He died under the age of twenty-three years. The sale of the west half of lot 14 to *Smith* was carried out by the executors.

1881.

Holby
v.
Wilkinson.

The principal question raised is, whether *Walter* took a vested or a contingent interest under the will of *Robert Gardner*.

In the devise to *Walter* the word "that" is merely superfluous, and the devise to him is "when he is of the age of twenty-three years." These words, by themselves alone, would clearly create a contingent interest only. The question is, whether this devise falls within the class of cases where there is a devise to some person, until a person to whom there is a devise in remainder, attains his majority or such age as the testator may appoint, when the remainderman shall take. It is clear that in such case a vested interest passes. *Boraston's Case* (a) was a case of that class. So was the case of *Manfield v. Dugard* (b), where a man devised lands to his wife till his son should become of age, and when "his son should attain to his age then to his son and his heirs." The testator died, the son lived to the age of thirteen, and died. It was held that the devise to the son conveyed a vested interest. *Goodtitle ex dem Hayward v. Whitby* (c), and *Doe Wheadon v. Lee* (d), establish the same rule of construction, and it appears from the cases that the rule is the same whether the rents and profits are made applicable in the meantime to the benefit of the remainderman, or of the person having the intermediate estate, or the general purposes of the estate of the testator.

Judgment.

Lord Chief Justice *Tindal* delivering the opinion of the Judges in *Phipps v. Ackers* (e), referring to *Boraston's Case* and the other cases of that class, says

(a) 3 Rep. 19.

(b) 1 Eq. Ca. Ab. 196 pl. 4.

(c) 1 Burr. 228.

(d) 3 T. R. 41.

(e) 9 C. & F. 591.

1881. *Holby v. Wilkinson.* that they proceed on the ground "that the estate given to the devisee on his attaining twenty-one, is in fact only a remainder, taking effect in its natural order, on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates."

The will before me does not certainly put the intention of the testator into such clear language as was the case in the wills referred to in the English cases; but the testator was *inops consilii*, and we must spell out his intention from his whole will and give effect, if effect can be given to the scheme which we can gather from the language he has used he proposed to himself for the disposition of his property, bearing in mind the rule of construction that the law leans in favour of the vesting of interests devised or bequeathed.

Judgment. Now, reading together the first and secondly quoted clauses of the will, the testator does by the first give a life-estate in all his real and personal property to his wife, subject, however, to provisions in other parts of his will in favour of other persons, and the first exception to the generality of the provision for his wife is the provision for *Walter Gardner*, and the provision for his wife and that for *Walter Gardner* consist perfectly, and there is no difficulty in working them out. The wife takes the whole, subject to exceptions; as to one of these exceptions, the land devised to *Walter*, she takes it with the rest until *Walter* attains the age of twenty-three, and when he attains that age then he takes in fee. This is substantially the same disposition as was made in *Manfield v. Dugard*, and the cases are distinguishable only in the mode of expression in the two wills. They both have this in common, that the estate prior to the attainment of the age of the remainderman has been given to a third person, as put by *Tindal, C.J.*, in *Phipps v. Ackers* "either for the benefit of the devisee himself

or for the benefit of some other person to endure during his minority," or as in this case until he should attain the age of twenty-three. My conclusion, therefore, is, that the estate of *Walter Gardner* is entitled.

1881.

Holtby
v.
Wilkinson.

There is a strange repugnancy in the subject matter of the devise to *Walter*. What is given is, "two hundred acres of land, the west half of lot No. 14," in such a concession, &c. The testator in fact owned the whole of lot 14, and later in his will describes it correctly as "being 200 acres." If the devise had been the converse of this, and had been of lot 14, containing 100 acres, I suppose the whole lot would have passed under the rule *falsa demonstratio non nocet*. All that is certain upon this devise is, that either the whole or a half of the lot was intended. It is difficult to resist the conviction that the testator was not correctly understood by his amanuensis, probably in two points, the number of acres and the half of the lot. I infer the latter as probable from the circumstance of the west half of the lot having been sold by the testator not long before. Judgment. I have not seen any case resembling this, the cases cited from the Common Pleas and the old series of Queen Bench Reports do not assist in the construction of this devise. One thing appears to me certain that the testator could not have meant what he is made to say, viz., that 200 acres was the west half of the lot, for the will itself contains internal evidence that he knew the fact to be otherwise. There is the rule as to repugnancy in Wills (a), that the clause or gift which comes last, which is nearest in position to the end of the will, shall prevail. I confess I do not think that the rule is intended to apply to such a case as this; but that this is rather a case of *falsa demonstratio*. It is clear that it was the intention of the testator to devise to *Walter* one of the halves, the east or west half of lot 14. His having contracted for the sale of the west half is

(a) Flood 469.

1881. *Holtby v. Wilkinson.* not sufficient to negative this clearly expressed intention, especially looking at the terms of the contract which provides for forfeiture in case of default; and to the power given by the will to the executors to sell any of the properties devised, the devisees in that event taking the proceeds of sale in lieu of the property in specie. I think the will cannot be intepreted as devising the whole lot to *Walter*, but his estate is in my opinion entitled to the proceeds of the sale of the west half.

The costs of this litigation must come out of the estate of the testator.

COLLARD V. BENNETT.

Fraudulent conveyance—Husband and wife—Statute of Elizabeth.

The defendant *B.*, who was carrying on a thriving business, and possessed of personal property to the value of about \$1,000, his debts not exceeding half that sum, in 1876 bought some land which he had conveyed to his wife, who had been instrumental in increasing the earnings of her husband. It was shewn that all debts due by *B.* at the time of the settlement had been paid before the institution of this suit by the plaintiff, whose debt had accrued after this conveyance.

Held, under the circumstances, that the plaintiff was not in a position to impeach the conveyance, as it had not been made with a view of placing the property beyond the reach of future creditors. In 1877, *B.*, being in difficulties, could not obtain credit. In 1878 the debt to the plaintiff was contracted, and in the same year *B.* made additions to the house on the land, which he paid for.

Held, that in respect of the money so expended, the case came within the principle of *Jackson v. Bowman*, ante volume xiv., page 156.

Statement. This was a suit instituted by the plaintiff against the defendants seeking to have a conveyance of certain lands purchased by the defendant *Bennett*, and which at his instance were conveyed by the vendor to *Bennett's* wife declared fraudulent as against creditors. It appeared that in August, 1876, *Bennett* had pur-

chased the property in question from one *Beatty*, 1881.
and had the same conveyed to his wife as a provision
for herself. It was shewn that all the debts due by
Bennett at the time of such conveyance had been paid
off prior to the filing of the present bill, and that the
debt due the plaintiff had been incurred by *Bennett*
since the settlement on the wife had been made.

Collard
v.
Bennett.

The evidence had been taken at the sittings of the
Court at St. Catharines, in the Autumn of 1880, the
nature of which is stated in the judgment.

Mr. *W. Cassels*, for the plaintiff. If the transaction
was really intended as a settlement on the wife, the
husband was not at that time in a position to make
any settlement. The evidence shews that the purchase
was made from *Beatty* in 1876, and in 1877, the hus-
band was in such difficulties that it was impossible for
him to obtain any credit, and yet in 1878, he made an
addition to the building in which he was carrying on
his business of hotel-keeper, and paid therefor, as far
as it was paid, out of the moneys received in his busi-
ness. In reality the husband settled or attempted to
settle all his estate on his wife; and this, it will be in-
ferred, was done in order to defeat creditors,—future,
if not then existing ones: *Campbell v. Chapman (a)*,
McKay v. Douglass (b), *Buckland v. Rose (c)*.

Argument.

Mr. *Bethune*, Q. C., for the defendants. There was
not on the part of either of the defendants any attempt
at fraud, neither was their object to defeat, hinder, or
delay creditors. The object of both parties was the
laudable one of honestly endeavouring to obtain a
home for themselves; and that it should be held in the
name of the wife, who it has been shewn was instru-
mental in earning the money wherewith the property
was purchased: *Hunt v. Riley (d)*, *Freeman v. Pope (e)*.

(a) 26 Gr. 240.

(b) L. R. 14 Eq. 106.

(c) 7 Gr. 440.

(d) L. R. 14 Eq. 180.

(e) L. R. 9 Eq. 206.

1881.

Collard
v.
Bennett.

It is alleged that the husband was not in a condition to make such a settlement or provision for his wife; the facts shew the contrary, however. His debts were of but an inconsiderable amount, and every one of them was paid off prior to the institution of these proceedings. The case is clearly not within *Campbell v. Chapman*, so strongly relied on by the plaintiff.

Mr. W. Cassels, in reply, cited *Morton v. Nihan* (a), *Crossly v. Elworthy* (b), *Irwin v. Freeman* (c).

Judgment. SPRAGGE, C.—I will assume that the conveyance by *Bennett* to his wife of 30th August, 1876, was a voluntary settlement. *Bennett* was at the time carrying on the business of a hotel keeper at Port Robinson, and part of his business was the boarding and lodging of a considerable number of men, averaging somewhere about forty. At the date of the conveyance he had been carrying on this business for two or three years, and he had been carrying on the like business before that at the St. Clair Flats.

If this conveyance were made with a view to placing this property beyond the reach of then present, or of future creditors, or if the effect of its being made was to leave insufficient property of the settlor for the satisfaction of his debts, in either case it would be void under the Statute of Elizabeth. It is another question, which I will come to presently, whether this plaintiff is in a position to impeach it.

The sum of \$1,400 was paid down to *Beatty*, the vendor of the property, at the execution of the deed. This was the money either of *Bennett* or of his wife. I will assume it to have been the money of *Bennett*. *Bennett* was largely aided by the personal exertions of his wife in the conduct of his business, and spoke to others of his being so. I refer to this, not as

(a) 5 App. 20.

(b) L. R. 12 Eq. 158.

(c) 13 Gr. 465.

giving her any claim to the land or to the money with which it was purchased, but as furnishing a motive in the mind of *Bennett* for having the conveyance made to her. It was looked upon by both as money earned largely by her exertions.

1881.

Collard
v.
Bennett.

It is proved that he was at the time carrying on a prosperous business, and that he had chattel property of the value of from \$800 to \$1,000, and it appears from the evidence that his debts did not exceed half that amount. So that taking the onus to be upon the wife to shew that the settlor was then in a position to make a voluntary settlement, I think she has shewn it.

The debt upon which the plaintiff has recovered judgment accrued after the settlement, and the debts of the settlor existing at the date of the settlement have been paid before the filing of the plaintiff's bill. I take the rule to be that the subsequent creditor cannot under such circumstances impeach the settlement. An exception would be, I should say, where the settlement is made in order to defeat future creditors. My conclusion, therefore, is, that the settlement of August, 1876, is not successfully impeached. The bill, however, makes a secondary claim upon the settled property.

Judgment.

In the summer of 1878, an addition was made to the settled property with moneys which I take to have been moneys of the husband. At that date things had become worse with *Bennett*. Before that, as his wife says in her evidence, he was not to say a temperate man, and the bad habit had grown upon him. Her answer to one question was, "He would take a little once in a while, nothing to do him any particular harm, up to a year or so before he went away." He left, *i.e.*, he absconded for debt in June, 1879.

The evidence is, that the plaintiff's bill was contracted in 1878—that seems the date agreed upon by the parties. In 1877 his paper would no longer be

1881. accepted by the banks, and from that time on he became embarrassed. At the date of the addition being made to the house he was certainly not in a position financially to make a voluntary settlement.

Collard
v.
Bennett.

I think the case comes within the principle of *Jackson v. Bowman* (a), and that the decree should be *mutatis mutandis* in the same terms. I think also that there should, as in that case, be no costs paid either to or by the wife.

HILL V. MERCHANTS AND MANUFACTURERS' INSURANCE COMPANY.

Mutual Insurance Company—Receiver—Assessment on premium notes.

Where an application was made to the Court to add the persons who had signed premium notes as parties in the Master's office, and to direct the Master to assess the amounts due upon the notes, and to order payment of the same to the Receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R. S. O. ch. 161, secs. 45, *et seq.*

Held, that as the liability attached only upon such assessment by the Directors, the Court could not add to, or alter the liability of the parties who had made the notes by referring it to the Master or a Receiver to do that which the Directors only could do; clause 75 of 36 Vic. ch. 44, which gave power to a Receiver to do this, having been omitted from the Statute on revision.

Statement. This was a motion by the plaintiff on petition to add the makers of certain premium notes given by them to the defendant Company, in the Master's office, and for an order directing the Master to assess the amounts properly payable by them on such notes, and that the parties so liable should be directed to pay the sums assessed against them from time to time to the Receiver, the Directors of the Company having omitted to make the required assessment.

Mr. *Duff*, for the petitioner and the Receiver.

1881.

Mr. *Osler*, Q.C., for the defendants.

Hill
v.
Merchants
and Manu-
facturers'
Ins. Co.

Mr. *Lazier*, for the makers of some of the premium notes sought to be added, contra.

BLAKE, V.C.—The plaintiff has filed his petition, asking for an order adding as parties in the Master's Office all persons who have signed certain premium notes, and directing the Master to assess the amounts due by them, and ordering from time to time the payment of these amounts to the receiver. The undertaking on which it is sought to make these parties liable covers "whatever assessments the directors may, from time to time, determine or as they may think necessary to meet losses and expenses," &c. It is admitted that the directors have not made the assessments on these undertakings in respect of which it is sought to add and make liable these parties. That being so, I cannot alter or add to the liability under which these persons have come; and refer to the Master or to a Receiver the fulfilment of that condition on which the liability in question attached. By sec. 41 of 36 Vict. ch. 44, O., it is enacted that, "said notes or undertakings * * be assessed for the losses and expenses of the company, in manner hereinafter provided." Sec. 43: "All premium notes or undertakings belonging to the company shall be assessed under the direction of the board of directors." It is on these sections the undertakings are based, and following them the company has declared the condition on which the liability or right to recover arises, and from this the Court cannot vary. These sections appear as 45 *et seq.* of R. S. O. ch. 161. By sec. 74 of the first mentioned Act the Lieutenant-Governor in Council has power to appoint a person to examine into the affairs of the company, and, when on his report it is thought

Judgment.

1881. *Hill v. Merchants and Manufacturers' Ins. Co.* advisable, the Attorney-General has power to apply to one of the superior Courts, which may appoint a Receiver, who is empowered to wind up the affairs of the company. By sec. 75, "such Receiver shall have power, under the authority of the Court appointing him, to make all such assessments on the premium notes or undertakings held by the said company as may be necessary to pay its debts and claims against it, as the directors would have authority to make; and the notice of assessment may be given in the same manner as is hereinbefore provided: and the said Receiver shall have the like rights and remedies upon and in consequence of the non-payment of such assessments as are given to the company or the directors thereof." These sections made provision for the difficulty in the present case; but, on the revision of the Statutes, no doubt thinking, as Mr. Osler suggested, that such provisions would interfere with the rights of the Dominion Legislature, were struck out by cap. 7, 40 Vict., Sched. A. 147. The provision for giving these powers to the Receiver were omitted, and the present sec. 78 does not, consequently, contain the provision found in the earlier enactment. I do not think, even if this enactment was in force, I could allow the applicant the benefit of it in these proceedings; the steps required by the Act should have been taken—the examination of the affairs of the company by an order in Council had, and thereupon an application by the *Attorney General* to the Court for a winding-up order. I must refuse the application, with costs.

Judgment.

1881.

THE MUSKOKA MILL COMPANY V. THE QUEEN.

Petition of right—Alleged tortious act of Crown—35 Vict. ch. 13, O.—Practice—Costs.

In order to establish a right to damages as against the Crown for having, as alleged, obstructed the flow of water to the mills of the suppliants, it is incumbent on the suppliants to shew that less than the natural volume of water forming the stream reaches their mill on account of such alleged obstruction: therefore, where it appeared upon the evidence that certain waters alleged to have been penned back by a dam would never have reached the mills of the suppliants, and the extreme and unprecedented dryness of the season had had an appreciable effect upon the supply of water. *Held*, that the evidence did not sustain the petition, which alleged that the suppliants sustained damage by the erection of a dam across the river, above their mill.

The maxim that the Crown can do no wrong, applies to alleged tortious acts of the officers of a public department of Ontario, and a petition of right will not lie for such alleged wrongful acts under 35 Vict. ch. 13, O., which creates no new right in the subject against the Crown, but relates rather to procedure only.

The redress of a subject suffering damage from such acts, if unauthorized by Statute, would be against the subject who committed the wrong, and not against the Crown.

In dealing with the question of costs upon a petition of right, the same rule will be applied as if the question was one between subject and subject; therefore, where on a petition of right the Crown instead of demurring, went to a hearing. The Court [SPRAGGE, C.] on dismissing the petition, allowed to the Crown such costs only as would have been taxed had the liability of the Crown been raised by demurrer.

This was a proceeding by petition of right presented Statement. by *The Muskoka Mill and Lumber Co.* and *John Conly Hughson*, of the city of Albany, and *Anson Green Phelps Dodge*, of New York, who had carried on business under the style or firm of *Hughson & Co.*, setting forth that the suppliant company was duly incorporated by letters patent on the 28th of January, 1875, under the Act in that behalf and were engaged in manufacturing deals and other materials at the mouth of the Muskoka river; that the petitioners were assignees by purchase of 254 acres of land at the

1881. mouth of said river, which had been expressly sold and granted by the crown to one *Louis Hotchkiss* in 1870 as a mill site, and were by him bought for that purpose, and afterwards by the firm of *Hughson & Co.* from him for a like purpose, which lands were in the said petition particularly described by metes and bounds, including a small island lying a short distance to the eastward of the most westerly mouth of the said river, and shewn on a plan accompanying the petition, as "Sandy Island."

Munkoka
Mill Co.
v.
The Queen.

The petition further set forth that a very large sum of money had been invested by *Hotchkiss* and by the firm of *Hughson & Co.* in the erection of mills and other works on the said premises, in the belief and on the faith that they would have and enjoy the free and uninterrupted use of the waters of the river as they were entitled to do, and the said mills and other property belonging to the said *Hughson & Co.* were duly sold to the petitioners, and the equitable interest therein became vested in the petitioners under a trust deed referred to in the letters patent, and the petitioners since the date of the said patent were entitled to the said premises, and to all the assets, rights, and privileges of the said firm of *Hughson & Co.*, in respect of the business formerly carried on by them, the said *Hughson & Co.*, at the said mills; that amongst other assets so vested in the petitioners was a claim against Her Majesty the Queen for damages, which in the autumn of the year 1871 were claimed by *Hughson & Co.*, and in respect of which a petition had been presented to the Lieutenant-Governor-in-Council on the 1st of October, 1872, by them, which petition was continued in the name of the said firm, and had only recently been disposed of by a suggestion made by the Hon. the Commissioner of Public Works, that it would have been more satisfactory to raise the matters involved in the petition by way of petition of right, and the delay in getting the said petition disposed of

Statement.

was the sole reason for the petitioners not having proceeded by petition of right at an earlier date.

The petition then set forth the circumstances under which the said *Hughson & Co.* claimed, and also the petitioners claimed such damages, (1) *Hughson & Co.* were at and before the time of the occurrence of the alleged damages the owners of and were working mills on the said premises, where they had eighty men employed, besides three tugs and barges, which engaged about forty men, in all about 120 men; (2) the said mills were dependent solely on the waters of the Muskoka river for the power necessary to work them, and had always been worked thereby; (3) that the stream of the said river ran through the said premises, and *Hughson & Co.* were entitled to the free and uninterrupted use of the said stream for the purpose of propelling the said mills in common with other persons using the stream; and at and before the time of the grant of the said lands to the said *Hotchkiss*, and until the time hereinafter mentioned, the waters of the said stream ran through the said premises without any hindrance, and *Hughson & Co.* and their assigns were entitled to enjoy the privileges of the said stream for all time to come. (4) In the early part of September, 1871, the supply of water at the said mills became so small that *Hughson & Co.* were obliged to reduce their working force, which they did to the utmost practicable extent, but they could not reduce it to an extent commensurate with the necessities of the case, as the engagements for service made with some of the men were of such a nature as to prevent *Hughson & Co.* from summarily discharging them; (5) during that month the water fell so much that the work of sawing ceased, but for the reason above alleged *Hughson & Co.* were obliged to pay wages to men who were engaged by the year or for the season, although the men were not required, involving great loss; (6) further loss was incurred during the month of Septem-

1881.

Muskoka
Mill Co.
v.
The Queen.

Statement.

1881. ber and part of October by *Hughson & Co.*, in consequence of their having three tugs and their consort barges idle for a period equal to two trips to Buffalo, or of the carriage of 3,000,000 feet of timber; (7) besides all these expenses they had to keep on hand a large stock which otherwise would have been carried to market and disposed of, and they also suffered loss and damage from their not being able to fulfil engagements for the delivery of material which they engaged to deliver; (8) the sums of money paid out by *Hughson & Co.* for the services of men and vessels during this time, thus engaged while unemployed, amounted to \$6,600, which with interest at 6 per cent. amounted at the time of filing the petition to about \$10,000; (9) that *Hughson & Co.* at first supposed that the scarcity of water was owing to natural causes, but they afterwards discovered on sending men up the stream towards lake Muskoka that it was owing to the erection of a dam under the direction of the Public Works Department, at the outlet of the river from that lake, and on applying to that Department they were informed, as the fact was, that the said dam had been put there at the request of some steamboat owners so as to raise the water in the lake. The petition further set forth that *Hughson & Co.* had been content to forego any other claim for damages than that for money actually expended, if an early settlement of their claim were made; but that the petitioners had been so much inconvenienced by the non-settlement thereof that they considered themselves justified in claiming, as they did, such additional damages as being justly payable to them, which amounted to \$10,000, and the petitioners submitted that under ch. 28 of 32 Vict. they were entitled to compensation for such damages; also, that independently of that statute, and as assignees of *Hughson & Co.*, they were entitled to such damages, and that Her Majesty could not derogate from the right of *Hughson & Co.* to have the free use

Muskoka
Mill Co.
v.
The Queen.

Statement.

of the said waters without making reasonable and proper compensation for any injury sustained by any derogation therefrom. The petitioners also submitted that the Department of Public Works had not power to interfere with the free course of such stream in derogation of the rights of *Hughson & Co.*, so as to deprive them of their right thereto or to damages.

The petition further stated that the Department of Public Works had at times assigned as a reason for the nonpayment of the claim made by the petitioners that *Hughson & Co.* had wrongfully had the said dam pierced so as to let the water run out more rapidly, and that therefore they were not entitled to demand any compensation for the injury sustained; but that *Hughson & Co.* denied all participation in or knowledge of the act of piercing said dam.

The petition also alleged that it was doubtful whether under the trust deed referred to the legal title to the claim of *Hughson & Co.* passed to the petitioners, and for that reason the said *Hughson & Co.* had consented to become parties to the petition, and to do any act that might be necessary to realize the said claim in behalf of the petitioners.

The suppliants *The Muskoka Mill and Lumber Co.*, therefore prayed that they might be paid the said sums of \$6,600 and \$10,000, or such larger sum as they might prove themselves entitled to under the circumstances stated, together with interest thereon, from the times when respectively the moneys comprising the sum of \$6,600 were advanced or the damages were sustained: and for further and other relief.

The answer of the Hon. *Oliver Mowat*, Her Majesty's Attorney General for Ontario, admitted that the petitioners were working mills at the mouth of the Muskoka river at the time mentioned in the petition, but whether they were entitled to the free and uninterrupted use of the said stream in the manner therein stated, and as to all other matters in the said petition mentioned, he

1881.
Muskoka
Mill Co.
v.
The Queen.

Statement.

1881. left the petitioners to prove the same; that the Government of Ontario did, in the autumn of 1871, in the interest of the public, cause a certain temporary dam to be placed at the outlet of said stream from lake Muskoka, for the purpose of improving and rendering possible the navigation of the waters of lakes Muskoka and Rosseau, but put the petitioners to the proof that the supply of water to their mill was thereby rendered insufficient, or that any loss or damage accrued to them by reason of such erection; that a permanent dam for the purpose before stated had since been erected by the Government of Ontario in the place of such temporary dam, and that the construction and maintenance of such permanent dam had been of great advantage to the petitioners, and more than compensated them for any loss or damage sustained by the erection of such temporary dam.

Muskoka
Mill Co.
v.
The Queen.

Statement. The answer also submitted that if the petitioners were entitled to any compensation—which, however, it did not admit—under the provisions of the Act respecting the public works of Ontario, all claims against the Crown falling within the scope of the said Act, provisions are therein made for the disposal of such claims by arbitration and not by application to the Court; and that the petitioners had never submitted their claims for damages to arbitration under said Act, and that they had lost their right so to do, if any they ever had, by reason of not having filed their claim with the secretary of the Department of Public Works as required by such Act.

The answer further alleged that the petitioners, or some or one of them, or some person or persons in their employ, and by their directions did, on or about the 6th day of October, 1871, wrongfully enter upon, break down and destroy the said dam so erected by and being the property of the Government, as aforesaid, and thereby caused great damage and loss to the Government amounting to several hundred dollars; and

claimed by way of cross-relief an account thereof and 1881.
payment of the amount that might be found due.

The matter came on for hearing at the sittings of the Court at Toronto, in the autumn of 1878. The nature of the evidence then adduced appears in the judgment.

Muskoka
Mill Co.
v.
The Queen.

Mr. *E. Blake*, Q.C., and Mr. *Cattanach*, for the suppliants. The grant of the lands in this case having been made upon the condition that the grantees would erect the mills, and which were constructed in compliance with such stipulation, there is an implied contract on the part of the Executive to abstain from doing any act that would impair in any degree the benefits intended to be conferred by the grant or abridge its use in any way. It is no answer in a case like the present that the act complained of was done for the benefit or in the interest of the public. It may be that such an objection would be a ground for refusing an injunction, the effect of which might be to compel the destruction of the works that had been completed, but certainly not for refusing to compensate the party injured. Indeed, the principle of compensation is clearly recognized in the Act relating to public works. The evidence does not establish that the work had been done so skilfully that as little damage as possible would be inflicted on the suppliants; and which had it been done earlier in the summer would have caused comparatively little or no damage to the suppliants. The Public Works Act gives compensation in all cases, and in cases where, as between subject and subject, there probably would not have been any right to claim damages. They referred to *Robinson v. Grave* (a), *Siddons v. Short* (b), *Brown v. Stuart* (c), *Juson v. Reynolds* (d), *Simpson v. Hartman* (e), *Kerr v. Cog-*

Argument.

(a) 21 W. R. 223.

(c) 12 U. C. R. 510.

(e) 27 U. C. R. 460.

(b) L. R. 2 C. P. Div. 572.

(d) 34 U. C. R. at 195.

1881. *hill (a), Edinburgh Life Assurance Co. v. Barnhart (b), Lord v. Commissioners of Sydney (c), Clarke v. Bonnycastle (d), Miner v. Gilmour (e), Commissioners of The Queen. Public Works v. Daly (f), Goddard on Easements, 67; Gale on Easements, 76-84; Angell on Watercourses (1877), p. 272, secs. 153b and 161; Phear on Watercourses, 19, 20, 22.*

Mr. Edgar and Mr. J. S. Cartwright, for the Crown. The foundation of the claim of the suppliants is, that the Act complained of was wrongful; now the Crown is never liable for the tortious acts of its servants either under the Public Works' Act or the Petition of Rights' Act: *Feather v. Regina (g)*. Grants of rights in water are always construed strictly: *Whitehead v. Parke (h)*. Here the suppliants are entitled to the natural flow of the stream, but they or those under whom they claim title had constructed a dam at Moon river and it is not shewn in this case that there was water enough in the stream without the aid of such dam to drive the mills of the petitioners. By the letters patent making the grant to *Hotchkiss* "the water and the land covered with water" are expressly reserved from the grant; the effect of this we contend is to place the grantee in the same position as if the grant had been of lands on a navigable stream. The rights of a riparian proprietor are based upon the fact that the title to the bed of the stream is in him: *Fentyman v. Smith (a)*. Here it is sufficiently established by the evidence that the real cause of the lowness of the water at the mills was the extreme drought during that summer, which created first a partial and finally a complete failure of water. They also referred

(a) 25 Gr. 179.

(c) 12 Moo. P. C. at 497.

(e) 12 Moo. P. C. 131.

(g) 6 B. & S. at 283.

(b) 17 U. C. C. P. 63.

(d) 3 U. C. O. S. 528.

(f) 6 U. C. R. 33.

(h) 2 H. & N. 870.

to *Casselman v. Hersey* (a), *Fewster v. Turner* (b), 1881.
Johnson v. New River Co. (c), *Brine v. The Great*
Western R. W. Co. (d), *Hiscox v. Lander* (e), *Tobin v.*
Regina (f), *Weymouth v. Nugent* (g), *Wood v. Waud* (h). *Muskoka*
Mill Co.
The Queen.

Sept. 1st,
 1880.

SPRAGGE, C.—The petitioners' case is that they have sustained great loss by reason of the failure of water at their mills, and they attribute this failure of water to the dam, erected by the Government at the head of the Muskoka river. They state that in the early part of September, 1871, the supply of water became so small that they were obliged by degrees to reduce their working force to the greatest practicable extent; that during that month the water fell so much that the work of sawing ceased; that during that month and a part of October they lost by tugs and barges lying idle. In their petition to the Lieutenant Governor they stated that in the early part of September the supply of water at their mills became so small that they were obliged to suspend work, and they set forth the loss and damage thereby occasioned to them; and they state that upon inquiry as to the cause of the failure in the supply of water they found that it was occasioned by the erection of the Government dam. Mr. *Hughson*, a director of the petitioners' company, states the periods and in some degree the extent and manner of their suffering from want of water; that having during August had a sufficiency of water, they stopped running at night about 1st of September, they shut down entirely about the 12th or 15th of September; that the water was failing before that; that the mill was running partially for about ten days before they shut down.

Judgment.

It appears from the evidence that the water supply

(a) 32 U. C. R. 333.

(c) 2 E. & E. 435.

(e) 24 Gr. 250.

(g) 6 B. & S. 22.

(b) 11 L. J. Chy. 161.

(d) 2 B. & S. 411.

(f) 16 C. B. N. S. at 352,

(h) 3 Ex. 748.

1881. at the mills could not in the early part of September have been affected by the Government dam. The work of getting out timber was commenced about the 21st of August, and occupied about two weeks. The date of the commencement of the actual work on the ground is not shewn, but it could not have been earlier than the 4th of September, the last of the planking or sheeting was about the 18th or 20th of that month in the interval the bents or uprights were put in position, then the stringers, and then the planking or sheeting, about six feet in width of the latter being left open until the last day of that work, and lastly the brush was put in. The witnesses differ as to the effect produced by the work on the dam as it progressed; some say that it impeded the flow of water, others that the flow of water was not impeded until the planking was completed, and impeded but little until the putting in of the brush. Supposing the mill to have shut down on the 14th, that was preceded by about ten days of partial running, say from the 4th to the 14th, corresponding with the first ten days of work at the dam. From the nature of that part of the work as described by the witnesses it is scarcely possible that it could have appreciably affected the supply of water at the mills. I have put it as if the supply at the mills would correspond in time with the obstruction at the dam; but from three or four days to a week must be allowed for the passage of the water from the one spot to the other as appears by the evidence; taking this at five days it would be the 9th before the effects of the first bent placed in position could reach the mills. The five days from that to the 14th were employed in the earlier portion of the work. It is not exactly described, but from what is said of it I take it to have been open work, which could have done no more than retard for a short time the flow of a small portion of the water to the mills. The mills then stopped work when only the effects of the first five days work at the dam could

Muskoka
Mill Co.
v.
The Queen.

Judgment.

have been felt at the mills. It appears to me impossible looking at these dates that the work at the dam could have had anything to do with the short supply of water at the mill before the 9th, and very little, if anything, to do with it before the actual stoppage on the 14th.

Some other cause than the erection of the dam must be looked for to account for the lack of water before the 9th, for it is certain that the petitioners are not right in attributing it to the dam. There is another cause to which it may be attributed; the extreme, and all but one witness who speak of it say the unprecedented dryness of the season, and we hear of no rain until the 6th of October. I think the proper inference is, that the want of water supply which occasioned the stoppage of the mill was not caused by the works at the dam, but from want of rain.

This being the case, a large proportion, at any rate, of the claim of the petitioners must fail. But although the closing the mills about the 14th of September was from failure of water, through want of rain, it does not follow that the petitioners might not have been able to resume work at the mills earlier than they did, or than they could, but for the detention of water at the head of the river, by the dam. The plan from the Crown lands office, shews a large mill pond above the mills. The water would probably be nearly exhausted before the mills were "shut down," but there would be a new supply from the flowing down of the waters of the river into the pond. From the extreme dryness of the season, this would have been a slow process. Still the water would have gone down gradually, though slowly. It is in evidence that on the 6th of October the water stood above the dam, about two feet below the top of the dam. The water from Lake Muskoka finding its way down the river could at that time, I take it, have been only such as could have got through the dam by leakage in the dam itself. If the water thus penned back had not been prevented by the

1881.

Muskoka
Mill Co.
The Queen.

Judgment.

1881. dam from flowing in its natural course down the river, the water storage at the mill would have been increased, but whether sufficiently increased to enable the petitioners to resume the working of their mills two weeks earlier than they could have done but for the dam, or one week, or one day, or not at all, I have not the materials for judging. The evaporation on the lakes spoken of by witnesses between the dam and the river, as well as the quantity of water penned back, and other circumstances which might occur to experts would properly be taken into account. The dam was placed about fifty feet below the point at which the lake flows into the river, and the evidence leaves it doubtful whether the waters of the lake itself were raised to any appreciable extent by the dam; that also would have to be taken into account. The very purpose for which the dam was constructed no doubt was to raise the waters of the lake at points where the water was too shallow for navigation, but the evidence leaves it doubtful whether this purpose was accomplished. The dam appears to have been constructed in ignorance on the part of those entrusted with the work, of the existence of the mills at the mouth of the river.

Judgment.

I have so far proceeded upon the assumption that the waters of Lake Muskoka emptying themselves by the Muskoka river into Georgian Bay would in their natural course supply the mills of the petitioners; but the maps shew that the Muskoka river before reaching the Georgian Bay separates into two branches, one of them retaining the same name, the other being called Moon river; and the maps shew a dam across Moon river, a short distance below the point of separation, the effect of which is to throw the waters which would otherwise flow down it into the other channel which flows to the petitioners' mills, leaving no water to flow down Moon river, unless by defects in the dam, or when there is a superabundance of water. The quantity of water which would, but for the dam across Moon river, flow

down that stream is estimated at about half the quantity that reaches the point of separation, and it is in evidence that the dam across Moon river is on lands of the Crown, and was erected since the grant to the petitioners, and was erected by the petitioners or those under whom they claim; that it was not erected at any rate by, or on behalf of the Crown.

1881.

Muskoka
Mill Co.
v.
The Queen.

That portion of the waters therefore which by the erection of that dam are penned back and thus diverted from flowing down Moon river to the Georgian Bay, cannot possibly be waters which in their natural course would flow to the petitioners' mill; and as, all that the petitioners are entitled to is the use of waters flowing to their mill in their natural course, the waters which but for the dam would have flowed down Moon river must be taken into account; and the petitioners must shew how and for what time their mills could have run, without the aid of those waters, but for the erection of the Government dam.

If the suppliants are entitled to any relief these points would necessarily be subjects of inquiry in the Master's Office. One thing appears to me very certain that the claim made by the suppliants upon the Government is a most extravagant one, and that they have sought to make the Government pay for that which was not occasioned by the act of the Government, but by the dryness of the season.

The first question naturally presented upon this petition is, whether the suppliants have under the Act of the Provincial Legislature 35 Vict. ch. 13, any *locus standi* upon the case made by their petition.

I had before considering this question examined the evidence and considered to some extent the merits of the case, and had arrived at a conclusion upon some of the points made by the petitioners, and had put into writing the opinion I had so far formed of the case. I will refer to this presently; but will consider in the first place, whether the suppliants have any *locus standi* in Court.

1881. *Muskoka Mill Co. v. The Queen.* What is sought by this petition is, redress for an alleged wrongful act committed by officers of a public department of Ontario, or that which would be a wrongful act if committed by a subject: and it would, I apprehend, hardly be contended that without the aid of the Provincial Act the suppliants could have obtained relief by petition of right.

The English authorities establish that relief for wrongful acts committed by officers of the Crown can not be obtained by petition of right. Viscount *Canterbury v. The Attorney-General* (a) is one of the earliest of the modern cases, and though that case is spoken of by Sir *Alexander Cockburn* in *Feather v. The Queen* (b), as not a petition of right, but a petition addressed to the grace and favour of the King, it was in form, and was treated by Lord *Lyndhurst* as a petition of right; and he negatived the right of the suppliant to relief for wrong arising from negligent acts of the servant of the Crown. This was followed by *Tobin v. The Queen* (c) negativing the title to relief by petition of right for wrongful acts committed by servants of the Crown. The subject was again elaborately discussed by Sir *Alexander Cockburn* in *Feather v. The Queen* (d), and decided in the same way, and was again discussed in the more recent case of *Thomas v. The Queen* (e) in the judgment of the Court delivered by Mr. Justice *Blackburn*. The question in that case was, whether relief could be obtained on petition of right for breach of a contract entered into between the Secretary of War on behalf of the Crown and the suppliant, and it was decided that it could; the Court basing its decision upon the authority of *The Bankers' Case* reported in *Howell's State Trials* (f). Viscount *Canterbury v. The Attorney-General* was referred to as deciding that the Sovereign could not be sued by

(a) 1 Ph. 306.

(c) 16 C. B. 310.

(e) L. R. 10 Q. B. 31.

(b) 6 B. & S. 257, 294.

(d) p. 293.

(f) Vol. 14, p. 1.

petition of right for negligence: *Tobin v. The Queen*, 1881.
 that the Sovereign could not be sued by petition of right for a wrong. "But (it was added) in neither case was any opinion expressed that a petition of right will not lie for a contract," *Erle*, C. J., expressly saying that "claims founded on contract and grants made on behalf of the Crown are within a class legally distinct from wrongs." The learned Chief Justice observes, p. 34, that "the framers of the Act appear to have considered its chief utility to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the Government, so vastly on the increase in recent years, both in numbers and importance; whilst petitions of right in respect of specific lands or chattels must for the future be exceedingly rare."

Muskoka
 Mill Co.
 v.
 The Queen.

But it is contended that the language of our Provincial Act being general as to the relief to be obtained, and being without the qualification which is found in the Imperial Act, and also in the Acts on the same subject of the Dominion Parliament, gives relief in cases of wrong committed by officers of the Crown, as well as relief which is given by, or existed before the Imperial Act. In the interpretation clause in our Act the word relief is made to comprehend "every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money, or damages, or otherwise." The same words are used however in the Imperial Act and in the Dominion Acts: and, I apprehend, that such general words would not suffice to make the Crown liable for a wrong committed by its officers. The maxim that the Crown can do no wrong, is applicable to cases of this nature. It is thus put by *Cockburn*, C. J., in *Feather v. The Queen* (a): "The maxim that the King can do no wrong applies

Judgment.

(a) Page 295.

1881.

 Muskoka
 Mill Co.
 v.
 The Queen.

to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For from the maxim, that the King cannot do wrong, it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress."

It would be infringing this maxim and abridging the prerogative of the Crown by other than express words.

Judgment. There are, however, words in the Imperial Act which are not found in our Provincial Act. At the end of section 6, which relates to pleading, practice, and procedure, is this proviso, "Provided also, that nothing in this statute shall be construed to give to the subject any remedy against the Crown, in any case in which he would not have been entitled to such remedy before the passing of this Act."

Our Provincial Act assented to in March, 1872, does not contain these or any equivalent words. The Dominion Acts passed subsequently, one in 1875 the other in 1876, contain substantially the same language.

There is nothing in the words being contained in the Dominion Acts and not in the Provincial Act; for the Dominion Acts were passed subsequently, and by a different legislative body, but the omission of the words from the Provincial Act, that Act being framed obviously from the Imperial Act, is significant. It seems to indicate an intention that the relief against the Crown should not be limited as it was limited by the Imperial Act. But the question remains, whether the ancient prerogative of the Crown that the Crown

is not amenable to the subject for wrong committed by its officers may be taken away by other than express words; or by necessary implication from the words used. I speak of the Crown and the Crown Lands, and the prerogative of the Crown, because the course of legislation and judicial decision have treated these subjects as standing upon the same footing as in England.

1881.

Muskoka
Mill Co.
v.
The Queen.

I think it more than doubtful whether our Provincial Act has the effect of giving to the subject any new remedy against the Crown, making the Crown amenable where not amenable before, and infringing the legal maxim to which I have referred, in short creating a new right in the subject against the Crown, and giving a remedy in respect of it against the Crown, and this doubt is strengthened by looking at the whole scope and tenor of the Act. Its title and preamble shew what these are. The preamble recites that "it is expedient to make provision for proceeding by petition of right in this Province; and to assimilate the proceedings on such petitions and proceedings in behalf of the Crown, as nearly as may be to the course of practice and procedure now in force in actions and suits between subject and subject."

Judgment.

One would look in an Act whose purpose is thus set forth only for provisions in relation to procedure; and we find nothing else in the twenty-one sections of which it consists, until in the interpretation clause we find the words upon which this question is raised, that the relief shall comprehend *inter alia* "a payment of money or damages, or otherwise." The words "or otherwise" are the only words that make any real difficulty, for the payment of money or damages might well be in respect of breach of contract, which under *Thomas v. The Queen* would entitle the subject to relief.

My doubt whether such new remedy was intended to be given, is further strengthened by what we find

1881. to have been the state of the law when the Provincial Act in question was passed. The Provincial Legislature had three years before, in the "Act respecting the public works of Ontario," provided a remedy, and a procedure for obtaining it, in cases of alleged wrong done to the subject, of the nature of the alleged wrong complained of in this petition; or what would be a wrong if not done by officers of the Government authorized to do the act, for loss resulting from which compensation is sought. By this Public Works Act, the party sustaining loss may obtain compensation by arbitration, and the time for making his claim is limited to six months after loss or injury sustained, (or where there has been a contract, not the case here, after the date of final estimate.)

Muskoka
Mill Co.
v.
The Queen.

Judgment. I have used this provision in the Public Works Act as a reason against the supposed intention of the Legislature to give a remedy by petition of right for such acts by public servants of the Crown as are complained of in this petition: and allowing such remedy to be prosecuted not only by a different course of procedure, but at a time beyond the time limited by the earlier Act. But there is this further to be said: If this Act was done under lawfully constituted authority, it was not a wrong; and the person suffering the loss could not obtain compensation for it at all, unless some provision for compensating him were made; and then only in the mode provided for his compensation.

If this be so, the suppliants are met with this further difficulty. Taking the words of the Petition of Right Act, to comprehend acts of wrong by servants of the Crown, they cannot comprehend acts which are made lawful by Act of the Legislature, and so are not acts of wrong at all. If the Legislature had authorized the Department of Public Works to construct such works as the dam in question, and the Department had constructed it, and its construction had occasioned loss and damage to the suppliants; if the Legislature

stopped there, the suppliants would have been entitled to no relief in any shape, they could not have stated a case which would have entitled them to relief. The interpretation clause cannot be taken to apply to a case where there is no title to relief on any ground, whether of restitution of right, or return of lands or chattels or payment of money or damages for breach of contract, or for wrongful act committed. He must bring his title to relief under some head, and when he comes to state his case he brings it under no head of relief known to the law, and it appears to me to follow that he is not helped by the Petition of Rights Act, however comprehensive may be the construction put upon the interpretation clause. If it includes wrongful acts, the answer is, there has been no wrongful act here.

The suppliants then have no *locus standi* under the petition of right. They may be entitled to be compensated for damage sustained, but they must seek it in the only way in which the law gives it to them. Upon this point I refer to *The Queen v. The Commissioners of Woods and Forests* (a), *The Mersey Docks' Trustees v. Gibbs* (b), and the cases cited in *Hiscox v. Lander* (c), and these are only some of several cases to the same point. Judgment.

I have assumed that the erection of this dam was a work which the Public Works Department was authorized to construct, under the Public Works Act. Section 7 assumes this, and other clauses of the Act are in favour of the same interpretation. But if it were not so, it would not better the suppliants' case. It would be an act of personal wrong by those by whom the dam was constructed, for which the Crown could not be made liable in any shape; and the redress would be, not against the Crown, but against the subject who

(a) 15 Q. B. at p. 774. (b) L. R. 1 E & I. App. at p. 111.
(c) 24 Gr. 250.

1881.
Muskoka
Mill Co.
v.
The Queen

1881. committed the wrong. *Cockburn, C. J.*, said, in *Feather v. The Queen*, (p. 296.) "Let it not however be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without remedy, (p. 297.)

Muskoka
Mill Co.

The Queen.

* * in our opinion no authority is needed to establish, that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other."

Judgment.

My conclusion then is, that the suppliants have not in respect of the subject matter of their petition, any *locus standi* in this Court.

As to costs, I must deal with that question as I should deal with the like question between subject and subject. The question as to the liability of the Crown might have been raised upon demurrer, and in fact the like question has been so raised in several of the leading cases in England. The Crown is therefore entitled, upon dismissal of the petition, only to such costs as the Crown would have been entitled to if the question of liability had been raised by demurrer.

1881.

JESSUP V. GRAND TRUNK RAILWAY COMPANY.

*Railway Co.—Land acquired on condition of using it for station—
“Place,” meaning of—Statute of Limitations.*

The plaintiff being the owner of a tract of land near Prescott, on the 29th of October, 1849, agreed with the contractors engaged in the laying out of the railway of the defendants, and in acquiring lands and rights of way for the construction thereof, *in consideration of their placing the station of the railway for Prescott upon his land*, to convey to the contractors, their heirs, &c., six acres of such land for that purpose, and, if necessary, for the purposes of such station, to allow them to take an additional quantity, not exceeding in all ten acres. The station was erected in 1855 on these lands, and used by the company until 1864, when it was closed, and a station erected about one and a-half miles from the plaintiff's lands, and station buildings erected thereon, in consequence of which the plaintiff's remaining lands became depreciated in value. *Held*, that under the circumstances, and considering amongst other things, that the plaintiff would derive a permanent advantage from the station being retained permanently on the lands conveyed by him, and which he had granted in fee, instead of simply giving the company a right of way, the words in italics had been used in a sense indicating permanency, the consideration for the conveyance would not be performed by merely erecting the station, and afterwards removing it, at the pleasure of the company. The defendants having entered upon and retained possession of the lands, so agreed to be conveyed, for more than twenty years before the filing of the present bill, 1876, afforded no defence under the Statute of Limitations, as up to a period much within the twenty years their possession could not be questioned, and no right of suit had accrued to the plaintiff until the use of the lands for the purposes of the station was discontinued in 1864.

In such a case the Court (SPRAGGE, C.) considered that the plaintiff would be entitled to a decree, referring it to the Master to inquire as to damages, or directing a restitution of the lands, if they were not again used by the company for the purpose for which they had been conveyed to them.

It appearing in the case that the company had, since the institution of this suit, re-occupied the lands for the purposes of the station, that fact was to be recited in the decree, and leave reserved to the plaintiff to move in the cause should the company subsequently discontinue the use of these lands for the station.

This was a suit by *Hamilton Dibble Jessup*, the defendant in the suit of *Jackson v. Jessup*, reported

1881. *ante* volume v., page 548, against *The Grand Trunk Railway Company of Canada* seeking to compel the defendants to reconvey to the plaintiff the lands ordered in that suit to be conveyed by him, or to continue the use thereof for the station grounds of the road at Prescott, or for a reference as to damages.

Jessup
v.
Grand
Trunk R'y.

The facts appear clearly from the report of the case above referred to, and in the present judgment.

The cause came on for the examination of witnesses and hearing at the sittings at Brockville in the Spring of 1880.

Mr. Bethune, Q. C., and Mr. W. Jones, for the plaintiff.

Mr. Cassels, for the defendants.

Gray v. Richford (a), Wallace v. The Great Western R. W. Co. (b), Goyeau v. The Great Western R. W. Co. (c), Wilson v. Northampton and Bunbury R. W. Co. (d), Mead v. Bullard (e), were referred to.

June 11th. SPRAGGE, C.—This is a bill for relief against a railway company by reason of the removal of the station at Prescott, which was erected on land conveyed by the plaintiff to contractors for building of the road, in pursuance of the decree in *Jackson v. Jessup*, directing the making of such conveyance.

By the contract between the contractors and the company the contractors were to procure *inter alia*, right of way and station grounds, and to erect stations; and the plaintiff in this suit agreed to convey land, part of a large quantity of land, 240 acres, to the contractors without other consideration than the agreement on their part to place the Prescott station on his

Judgment.

(a) 2 Sup. C. R. 431.

(c) 3 App. 412.

(e) 7 Wallace 290.

(b) 3 App. R. 44.

(d) L. R. 9 Ch. 279.

land. The contractors did build the station on the plaintiff's land, and subsequently and after some litigation the plaintiff conveyed the land to the contractors. The contractors have since conveyed this land together with other railway property to the railway company.

1881.
Jessup
v.
Grand
Trunk Ry.

The station was built on the plaintiff's land about the year 1855, and the building continued to be used as the Prescott station till about the close of 1864, or the beginning of 1865, when it was closed; and a station erected about 1½ miles to the eastward, in the township of Edwardsburgh. This station has since been used as a station to serve the town of Prescott. The reasons for the change are not given; but the reason, no doubt, was that, in the opinion of the then manager of the railway, the exigencies of the road would be served by the change.

The plaintiff's object in making the agreement that he did with the contractors was, to bring into the market the other land which he owned in the neighbourhood, and in this he was successful to a certain extent; but not to the extent to which he would have been successful if the station had been continued on his land as the station of the railway at Prescott. It is proved that the removal of the station has caused great depreciation in the selling value of land in the neighbourhood.

Judgment.

The plaintiff paid his price for having the station on his land by the agreement to convey and subsequent conveyance of the ten acres of station grounds. For this the contractors agreed to "place" the station on his land. Their building the station there, and maintaining it there for some nine or ten years was in pursuance of their agreement; and the first question is, whether it was a performance of it.

Upon this I am referred, among other cases, to *Goyeau v. The G. W. R. Co. (a)*, in the Court of Appeal. The

(a) 3 App. 412.

1881. *Jessup v. Grand Trunk R'y.* question in that case was, whether an agreement to establish a railway terminus and depot on the plaintiff's land, was satisfied by the plaintiff's land, with other land being taken and used for that purpose, it being known to be the intention of the railway company to use other land with the plaintiff's for that purpose. Mr. Justice *Patterson* indeed intimated an opinion that the word establish did not necessarily mean to "maintain and use for ever." That however was not the *ratio decidendi*; and the late Chief Justice of that Court expressly refrained from expressing any opinion upon the use of the word "establish," and rested his judgment upon the conclusion that the terminus was upon land which included the parcel obtained from the plaintiff.

Judgment. In the case before me the railway company has ceased to use as station or station grounds any part of the ten acres which was the subject of the agreement and of the subsequent conveyance: so that the question is not the same as that which was the *ratio decidendi* in *Goyeau v. The G. W. R. Co.* The contract was between the plaintiff and the contractors with the railway company for the construction of the road; and is expressed thus: "That in consideration of their placing the station of the G. T. R. of Canada for the town of Prescott upon my land on the line of said railway, being lot (naming the land), I will convey (to the contractors naming them), their heirs, and assigns in fee simple, six acres of the said land for the purpose aforesaid," then follows a provision as to the part of the plaintiff's land from which the six acres were to be taken; and then a provision that if the six acres should not be enough for the express purposes of said station, then a greater quantity might be taken to the extent required for the purposes aforesaid, not in any case to exceed ten acres. A conveyance was to be made "as soon as the line is located and the land set out by the said contractors or the company's engi-

neers," and there is a proviso that "if the said station is not placed on said lands this agreement shall be void; and further that the said contractors or said company shall not be bound to accept this offer by the taking of this agreement."

1881.

Jessup
v.
Grand
Trunk R'y.

It does not seem to be very material whether the placing of the station on the plaintiff's land is regarded as a condition subsequent, or as the consideration for the land. I incline to think it is both. It was in this case the consideration, and the only consideration, which the plaintiff was to receive. The substantial question is, whether the word "place" used, in the connection and with regard to the subject matter that it is used, imports permanence; a permanent use of this piece of land for station and station grounds. The word by itself may import either a temporary act or a permanent use. In Worcester's Dictionary one of the meanings given is, "to fix, to settle, to establish." In the Imperial Dictionary it is used among other meanings as synonymous with locate, and would be used in England and by Englishmen in Canada (as these contractors were), where in the United States and frequently in Canada also the word locate would be used. In the same dictionary one of the meanings of the word locate is given thus, "in America to designate and determine the place of, as a committee was appointed to locate a church or a court house." If an ecclesiastical body desired to acquire a site for a church, or a municipal body a site for a court house, and had given authority to a committee to acquire a site for either of these purposes, and if the committee had entered into an agreement in the like terms, *mutatis mutandis*, with the terms of this agreement, how would it be interpreted? I should say beyond all question that there would be imputed to both parties to the agreement, an intention that the site acquired upon such terms and for such purpose, the purpose as in this case being expressed in the agreement, should be permanent. To hold the land

Judgment.

1881.
Jesseup
v.
Grand
Trunk R'y.

without devoting it to the purpose for which it was avowedly obtained would be simply bad faith, and I apprehend that a Court of Equity, if appealed to by the owner, would not permit it. The word "place" used in such agreement would be read as an agreement to place permanently. So any merely colourable compliance with the agreement would not be held a fulfilment of it.

But a third case might be where there had been a performance of the agreement in good faith, but circumstances had changed, or the mind of the ecclesiastical or municipal body had changed, or they thought honestly that in the interest of their church or county the site they had acquired for church or court house should no longer be used but be abandoned, or its use for that purpose abandoned, and that another site should be acquired and used for the purpose, and suppose this carried out. I am not saying now what the remedy of the owner would be, or whether he would have any remedy, I am merely putting a case which may throw light upon the meaning of the word "place" used in this agreement, by its use in a somewhat analogous case, aided too by the light of subsequent circumstances. In the case that I have put the owner might justly say—and the body that he had dealt with, if honest would admit—that the change was one not contemplated by either party, that they had dealt upon the footing of the land acquired being used permanently for the purpose for which it was acquired, and that the words "place" and "purpose" used in the contract between them, were used in the sense of the purpose being a permanent one.

It may be said that in the placing of the site of station grounds, it cannot be said that the parties look to their continuance in the same place, in the same way as they would in the case of a church or a court house. There may be some difference in this respect, but I should think not much difference. It appears

that in this case the contractors were in treaty for station grounds at Prescott with others besides the plaintiff, and the plaintiff's land was selected, with the approbation, as I infer from the evidence and the terms of the contract, of the railway company's engineers. There was nothing to lead the plaintiff to regard this as an arrangement that might be changed—everything to give him reason to assume that when once selected it would be permanent, and that the word "place" was used in the sense of permanency.

Then it was not a right of way that was being acquired from the plaintiff; but he was to give a conveyance in fee simple and did afterwards execute such a conveyance.

Further we may look at the object of the plaintiff in making this agreement; what his object was has been already explained. If the railway company or the contractors were to be at liberty at their pleasure to remove the station grounds elsewhere, the plaintiff's object would be, to a certain extent, defeated; in other words, the consideration for which he parted with his lands would, to a certain extent fail. If the location were taken to be permanent, he would bring his other lands into the market in his own time, not forcing into the market more than he could sell to advantage at the time. If the location were not permanent he would not be free to do this.

All these circumstances and considerations may properly be taken into account in order to the ascertainment of the sense in which the word "place" was used and understood by the parties to the contract. The American case of *Mead v. Ballard* (a) was referred to. It was cited to me in the case of *Goyeau v. The G. W. Railway Co.* (b). I say as I said then, that I do not agree in the reasoning upon which that case was decided nor in the conclusion arrived at; and I do not

1881.

Jessup
v.
Grand
Trunk R'y.

Judgment.

(a) 7 Wallace 290.

(b) 25 Gr. 65.

1881.
 Joseph
 v.
 Grand
 Trunk R'y.

find that in that respect the Court of Appeal differed from me in opinion. In the same case I took this view which need not, however, be reported over again here, that if the company had acquired the land under their compulsory powers they would have had to pay a money consideration, and I added: "So they, &c." See page 65 of the report.

If the defendants are right in their contention they may, having acquired the fee simple of this land by conveyance from the contractors, sell it off in building lots for their own profit; or make such other use of it as to them may seem fit.

I have not referred to the covenant of the contractors contained in the conveyance from the plaintiff to them, and prepared by their solicitor, which is perfectly explicit upon the point in question, because it was executed and, as far as appears, was prepared after the general conveyance from the contractors to the railway company. The conveyance from the plaintiff to the contractors was executed by the grantor and his wife only.

Judgment.

In my opinion, the railway company must be taken to have had notice of the agreement in question between the plaintiff and the contractors. At the time of the conveyance to the company by the contractors, it was the only title which the contractors had, and which passed to the railway company, and it appears always to have been held by Mr. John Bell, solicitor for the contractors, and afterwards solicitor for the railway company.

The case is one not free from difficulty; but I think, for the reasons that I have given, that the defendants committed what was in its effects a wrong upon the plaintiff by the removal of the station grounds from the land conveyed to them.

The defendants object that the Statute of Limitations applies to the case: that the defendants have been in possession for more than twenty years. The bill was filed

28th June, 1876. The possession and occupancy of the land by the contractors and then by the company were in accordance with the agreement to which I have referred until the use of the land for the purposes of a station was discontinued about the end of 1864 or the beginning of 1865. No right of suit accrued to the plaintiff before that event. The plaintiff had before that brought ejectment against the contractors which they successfully resisted and claimed a specific performance of the contract, which was adjudged in their favour, and the conveyance of the 29th October, 1864, was the result. I do not know that any clause of the Statute of Limitations applies to their case in terms or by analogy. What the defendants set up is, that they have been in absolute undisturbed and unquestioned possession for more than twenty years before the filing of the bill, and they plead and claim the benefit of the Statute of Limitations. The answer, what I have suggested, that until a period much within the twenty years which they set up, their possession could not be questioned as has been adjudged, and as is proved in this suit.

1881.
Jesup
v.
Grand
Trunk R'y.

Judgment.

In what I have said I desire not to be understood as meaning that a railway company having entered into an agreement, such as was entered into with the plaintiff in this case, should be held bound under all circumstances to continue it in the place where it was agreed that it should be first placed. It might turn out that very important interests to which great weight should be attached by the Court would make a change proper, or that public interests would suffer unless a change were made. What appears to me to be obviously unjust as a general rule (to which, however, there may possibly be exceptions) is, that a railway company obtaining a considerable piece of land, such as this is, for a particular purpose, and without the payment of any money consideration, should continue to hold it after ceasing to use it for the purpose for which ex-

1881. pressly they acquired it, where the discontinuance of its use for that purpose is to the serious detriment of the person from whom they acquired it.

Jessup
v.
Grand
Trunk R'y.

What the plaintiff prays for is specific performance; with an alternative which he puts thus: "And in the event of the plaintiff being unable to procure that relief that it may be declared that the plaintiff is entitled to recover damages for breach of the said agreement by the defendants."

I am informed by counsel, informally, that the defendants have, since the hearing of this case resumed the use of the station and station grounds on the land acquired from the plaintiff as the railway station and station grounds for Prescott. It is only in the event of the plaintiff not obtaining this that he asks for damages. I should not be prepared in any event to make the declaration that he asks, but should grant an inquiry as to damages or restitution of land if the land were not reoccupied by the defendants for the purpose for which they were acquired. If the fact be that they are now reoccupied for that purpose that fact may properly be recited in the decree, as now rendering unnecessary any decree for relief, and the decree may, if the plaintiff desires it, reserve leave to him to apply to the Court in the event of the defendants at any future time discontinuing to use the land in question for a station and station grounds for Prescott.

The decree will be with costs.

1881.

LABATT V. BIXEL.

Fraudulent preference—Defending one suit and allowing judgment to go by default in another—Assigning book debts—Exigible property.

A man in insolvent circumstances was sued about the same time, by two creditors, one of the plaintiffs being his son. To the one action he entered a defence, while to the other—that brought by his son—he made no defence, by reason of which judgment was obtained therein, and all his effects sold, which were bought in by an agent of the son, the whole realizing less than the debt, interest and costs. The amount claimed by the son being admitted to be a *bond fide* debt. The Court [SPRAGGE, C.] *Held*, that the refraining from putting in a defence to the action brought by the son was not such a facilitating of his recovering judgment as was prohibited by the statute—[R. S. O. ch. 118] in this following *Young v. Christie*, ante volume vii. p. 317.

In order to make up sufficient to satisfy the balance of the son's claim, the defendant in the action was urged to make an assignment to his son of all his book debts, which he did, thereby denuding himself of all property :

Held, that as the book debts could be seized under an execution, the assignment thereof was a fraudulent preference within the Act ; and the assignment being declared void, the son was ordered to account for the moneys received thereunder. Under the circumstances no costs were allowed to either party.

This was a bill by a judgment and execution creditor, under the Indigent Debtors' Act, impeaching a judgment recovered by *Charles Bixel*, a son of the defendant, the judgment debtor, against his father. Under the judgment so recovered by the son the goods of the father were sold, and were purchased by one *Wilson*, as agent for the son. Statement.

The judgment so recovered was impeached as recovered upon a fictitious debt. It was also impeached as recovered in contravention of the Act.

It was alleged that the father put in an appearance to enable the son to recover judgment before *Labatt*.

It was admitted that *Leonard Bixel*, the father, was insolvent in 1880, and so continued.

1881.

Labatt
v.
Bixel.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at London, in the spring of 1881.

The father, in his evidence, said that he was working the place as agent for his son. He further said that *Labatt* was suing, and he wished his son to get judgment first, because *Labatt's* judgment would sweep away everything: that he put in a plea to *Labatt's* action because his account was not correct: that he did not defend his son's action because it was a just debt: that he sent the writ in *Labatt's* suit to his solicitor, and he also sent the writ in his son's suit to his solicitor.

His son's purchase at the sheriff's sale was not sufficient to satisfy the amount of his judgment, and in consequence he asked for an assignment of the book debts, and his father made it, which had the effect of stripping him of everything—in fact there was really nothing left to the father.

Statement. The father further stated that when he took his son's writ to his attorney he could not say what he told him, but when he took the writ in *Labatt's* suit he told the attorney to defend it: that he did not defend it after his son recovered judgment, as he had then no means to defend it: that he shewed his son *Labatt's* writ and told him he intended to defend it; that he would naturally wish that his son should recover judgment first, but he said that he did not remember saying so to his son; that he said something to the effect that he should not defend his suit, or thought he said so, but did not tell his son to sue him.

Counsel for the defendants admitted that an appearance had been put in in the suit of the son, in order to judgment being recovered more rapidly—it would in that way be recovered sooner than by doing nothing.

The charges made in the bill that the claim of the son against his father was a fictitious debt were withdrawn by counsel for the plaintiff.

Mr. *Boyd*, Q. C., and Mr. *Fraser*, for the plaintiff.

1881.

Mr. *Bethune*, Q. C., for the defendants.

Labatt
v.
Bixel.

On behalf of the plaintiff it was contended that the judgment by *Charles Bixel*, against his father was clearly in contravention of the statute, and if any doubt could be entertained on that point, no possible question could be raised as to the illegality of the assignment by *Leonard Bixel* to his son of the book debts owing him, and although it was attempted to be sustained on the alleged ground that the transfer was made for the benefit of creditors, it was quite inconsistent with all the facts of the case, the father himself swearing that what he did was so done for the benefit of his son. The assignment was simply a voluntary one, and as such could not be permitted to stand so as to defeat the claims of other creditors.

For the defendants it was insisted that the judgment recovered by *Charles Bixel*, against his father, having been for a *bond fide* debt, was perfectly valid and binding on all parties interested. In *White v. Lord*, (a) the proceedings had been taken under the absconding debtors' Act, which contains provisions materially different from those of the Insolvent Act. In *Wilson v. Wilson* (b), the question raised was, whether the judgment there impeached had been recovered for a true debt; here no question is raised as to the *bond fide* character of the claim set up by *Charles Bixel*. *Ferguson v. Baird* (c). The other cases cited are mentioned in the judgment.

SPRAGGE, C.—The only question remaining for judgment after the admission made at the hearing is, *Judgment.* whether a judgment recovered as this judgment was

(a) 13 C. P. 292.

(b) 2 Pr. R. 374.

(c) 10 C. P. 493.

1881. recovered 's within the Indigent Debtors' or Fraudulent Preference Act. R. S. O. ch. 118.

Labatt
v.
Bixel.

What was done by the debtor was done in order to enable his son *Charles Bixel* to recover judgment earlier than *Labatt*.

The thing done was entering an appearance, and this enabled *Charles Bixel* to recover judgment earlier than if he had simply done nothing. If he had done nothing in that suit and had defended the other as he did, the plaintiff in that suit would have recovered judgment before *Labatt*. If he had refrained from doing anything, so refraining in order that judgment might be recovered in that suit earlier than in the other, it would not be within the mischief of the statute: *Young v. Christie* (a).

White v. Lord (b) was a case under the Absconding Debtors' Act.

It is not clear whether *Wilson v. Wilson* (c), before *Burns, J.*, was under that Act, or the Indigent Debtors' Act. If under the latter, it would be in opposition to *Young v. Christie*—both decided in the same year. The case of *McKenna v. Smith* (d) is in affirmance of *Young v. Christie*.

If I were construing the statute for the first time I should hold what was done in this case was not within the statute.

The statute avoids a judgment, the recovery of which is facilitated by the debtor in order to its gaining priority; but not all such judgments.

There are several ways in which the recovery of judgment may be facilitated.

By confession, *cognovit actionem*, or warrant of attorney; that is a class.

By abstaining from making any defence in the one suit.

(a) 7 Gr. 317.

(c) 2 Prac. R. 274.

(b) 13 C. P. 292.

(d) 10 Gr. 40.

By entering appearance and making no further defence. 1881.

Labatt
v.
Bixel.

Only the first class *in terms* is prohibited by the statute. It might have been reasonable to prohibit the others also, or to have made a general provision against a debtor preferring a creditor where two suits are pending against him.

The doctrine of *Draper*, C. J., in a case under the Married Woman's Act, as enunciated in the suit of *Kramer v. Glass* (a), applies here: "Every provision for these purposes is a departure from the common law, and so far as it is necessary to give these provisions full effect, we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give."

Both *Young v. Christie* and *McKenna v. Smith*, it would appear, proceeded upon the same doctrine.

The statute did remedy an evil. It might have gone Judgment. further in the same direction, but did not. If the Courts go further in the same direction, where the Legislature has stopped, what would it be but legislation.

There is another branch of the plaintiff's case which it is necessary to consider, viz.: the assignment of book debts to *Charles*.

The statute enumerates what may not be so assigned, stating particulars, and adding the word "property."

Mr. *Bethune* contends that this means only exigible property, as under the Statute of Frauds.

In this I agree, taking the word exigible in its wider and, as I think, proper sense.

It must be something that may be in some way reached by creditors, otherwise it is not withdrawn from creditors, or, in the words of the Statute of Elizabeth, creditors are not hindered, defeated, or delayed.

(a) 10 U. C. C. P. at p. 475.

1881. But if what is assigned could be reached by creditors by any process of any Court, then it is, in the proper sense of the term, exigible.

Labatt
v.
Bixel.

In considering the question of this assignment, the judgment recovered by *Charles Bixel* is, of course, to be put out of the case. The question is, whether book debts are exigible. It appears to me to be clear that they are so, because they may be reached by a proceeding under the Common Law Procedure Act, by creditors, in satisfaction of their debts.

Judgment.

If this be so, as in my opinion it is, there seems to me no good reason for not making *Charles Bixel* accountable for moneys that he has realized out of the book debts, which were assigned to him in contravention of the Act.

As to the costs :—each party will pay his or a.

1881.

SMITH V. PETERSVILLE.

Municipal council—Resignation of candidate after election—Notice of resignation of seat.

Sect. 195 of the Municipal Act provides that the effect of a party disclaiming the office to which he has been elected shall be to give the same to the candidate having the next highest number of votes.

Held, that this meant the candidate having such number of votes who has not been elected to the council; therefore, where the plaintiff was the candidate who was the fourth in that order, the three highest on the list having been declared elected, and one at the head of the poll resigned his seat, an injunction was granted to restrain the reeve and councillors of the village from preventing the plaintiff entering upon and discharging the duties of such office.

The notice of the party resigning the office stated that he resigned his "seat" in the council.

Held, sufficient; and that the plaintiff was entitled to his costs, although the Act requires notice of a resignation of the "office" to be given.

The plaintiff sought by his bill to restrain the defendants, the Reeve and Corporation of the Village of Petersville, from excluding him from office as one of the Councillors of that village. It appeared that on the 3rd of January last an election was held for the purpose of choosing a Reeve, a Deputy Reeve, and three Councillors for the village, when one *John Platt* was chosen Deputy Reeve by acclamation. A poll was demanded and held for the election of Reeve and three Councillors. Five Candidates, namely *Grant, McKay, Brodie, Smith*, and *Emigh*, were nominated for the offices of councillors, and two for that of reeve. The result of the poll was, that the two first named candidates received 201 votes each, the third named 191 votes, the plaintiff 171 votes, and the fifth candidate 75 votes, and thereupon the three gentlemen first named were declared duly elected as councillors. The defendant *Bartram* was elected Reeve by a considerable majority. On the 17th of January, and before the

Statement

1881.
 ———
 Smith
 v
 Petersville.

first meeting of the Council, and before in any way exercising the office, *Grant*, fearing that his election might be called in question, and intending to disclaim under the provisions of section 194, of ch. 174 R. S. O., delivered to the Clerk of the Municipality, a disclaimer, signed by him, in the following words: "I disclaim the seat as Councillor for the Village of Petersville, for which I have been elected," and the plaintiff thereupon at the said first meeting, claimed to be entitled to a seat in the council as being the next highest on the list of candidates, and sought to take his seat accordingly. The Reeve, however, refused to allow such claim of the plaintiff, and prevented him taking his seat, and treating the disclaimer as a resignation of the office, directed a new election under section 174. Upon such new election being held, the defendant *Evans* appeared as a candidate and was elected without opposition—the plaintiff declining to contest it in any other way than by giving notice of his claim to the seat, and that he would take the necessary steps to enforce it. In consequence of anticipated litigation *Evans* disclaimed the seat two days before the bill was filed, but omitted to give any notice thereof to the plaintiff.

Mr. *Boyd*, C. C., and Mr. *R. M. Meredith*, moved for an injunction in the terms of the prayer of the bill, contending that although *Grant's* disclaimer was not in the precise words used in the statute, still it was in substance the same, and had the same effect; his disclaimer was of the "seat," while the statute makes use of the word "office." The words "seat" and "office" are both used in the Act: see sections 172, 173, and 175.

Argument.

They further contended that in no case had the Reeve or Council power to determine the plaintiff's claim, or prevent him taking his seat. That if he or they, or any elector desired to controvert the claim made by the plaintiff, they had a simple and inexpensive remedy under the provisions of the Municipal Act: sec. 178,

et seq. They referred to *Regina v. Howard*, and *The City of Guelph*, before *Ostler, J.*, in Chambers, (not reported); *Gaughan v. Howard*, before *Cameron, J.*, at Nisi Prius; *Regina v. Cowan (a)*; *Regina ex rel. Bugg v. Bell (b)*; R. S. O. c. 1, ses. 8, sub-sec. 34.

1881.
Smith
v.
Peteraville.

The Reeve and Council chose to treat the disclaimer of *Grant* as a resignation under section 172; but clearly it was not so, and at the second meeting of the Council an erroneous statement was made to the effect, and then interlined in the minutes, that at the prior meeting such resignation had been accepted; but there could be no such resignation until after acceptance of the office. It is true that under sections 194 and 195 the disclaimer has the same operation and effect as a resignation, but only so as to let in the candidate having the next highest number of votes, and the plaintiff was the next highest "candidate." The first three ceased to be candidates when declared elected to office; the Reeve refused, however, to take the plaintiff's declaration of office and qualification though urged before the Council to do so, Argument.

Mr. *Hodgins, Q. C.*, for the defendants the Reeve and Corporation. If *Grant* is not out of office then the plaintiff has not any *locus standi*. In discussing this matter three questions naturally present themselves. (1) Has the plaintiff put himself in a position to complain of his exclusion from the seat, the answer to which must be in the negative, as it is shewn that the plaintiff has not yet made the declaration of office and qualification required by the 265th section of the Act. (2) Is not the disclaimer of *Grant* defective in form? We submit it is, and that the Reeve was justified in treating it in the manner stated, and ordering a new election. (3) The third and most important point is, that section 195 declares that the disclaimer shall act

(a) 24 U. C. R. 606.

(b) 4 Prac. R. 226.

1881. *as a resignation and thereupon the seat shall be given to the "next highest." This, however, has not the effect of raising Smith upon the list of candidates. The plaintiff was not the next highest to Grant.*

Smith
v.
Petersville.

Mr. *Bartram* for the defendant *Evans*. There has not been a controverted election so far as *Grant* was concerned. No notice had been given to the electors of any objection to his candidature.

Eastwood v. Lockwood (a), Stoddard v. Nelson (b), The Essex Case (c), Regina v. McMullen (d), The Tipperary Case (e), Regina v. Tewkesbury (f).

Mr. *Boyd*, Q. C., in reply.

PROUDFOOT, V. C.—At a contest for municipal honors and office in the village of *Petersville*, last January, three councillors had to be elected, and the result of the poll was that *Grant* had 201 votes, 201 were for *McKay*, 191 were for *Brodie*, and 171 were for *Smith* the present plaintiff. Before the time for taking the oath of office had expired *Grant* disclaimed the seat, and *Smith* the plaintiff claimed to be allowed to sit as councillor.

Judgment. A legal gentleman had been elected Reeve, and after considering the claim of the plaintiff, and the effect of the statutes thereon, he came to the conclusion that *Grant's* disclaimer was to be treated as a resignation under section 174 of the Municipal Act, and directed a new election to be had. At the polling day the plaintiff notified the electors of his claim and that he meant to enforce it. *Evans* was elected without opposition other than this notice. Two days before the filing of this bill, however, not liking the troubled appearance of matters and not desiring to be involved in litigation he also disclaimed, but gave no notice to the plaintiff.

(a) L. R. 3 Eq. 489.
(c) 9 U. C. L. J. 247.
(e) 9 Ir. C. L. 217.

(b) 6 D. M. & G. 62.
(d) 9 U. C. R. 467.
(f) L. R. 3 Q. B. 629.

The plaintiff by this bill seeks to have it declared that he is entitled to the office, and to have the defendants restrained from preventing him discharging its duties. The disclaimer was not in the exact terms of the Act, section 194, but was, I think, substantially in compliance with it. He disclaimed the seat, which is in this matter, equivalent to office, and is so used in other sections of the Act. And when he disclaimed the seat he must also be taken to have disclaimed all defence of any right he might have to it, though he did not insert these words in his disclaimer.

1881.

Smith
v.
Peteraville.

But it was contended that the plaintiff had no *locus standi* not having made the declaration of qualification required by section 263 of the Municipal Act. However valid this objection may be in many cases, I think it ought to have no weight here, for the plaintiff tendered himself for the office, the Reeve refused to admit his right; the Reeve also might have taken the declaration, and therefore it is not open to the defendants to raise such an objection, as it would have been useless for the plaintiff to have gone to some other officer and qualified himself by making the declaration when it would have been unavailing to obtain admission to the council.

Judgment.

The chief question discussed, however, was as to the effect of the disclaimer, and the construction of sections 194 and 195 of the Municipal Act.

These sections are arranged under a general heading, Division VIII., Controverted Elections, and hence it was contended that all the elections under that heading must be controverted elections. These sections seem to me to provide not only for the trial of controverted elections, but also point out a mode by which a controverted election may be avoided, and for this latter purpose reference must be had to elections that have not yet become controverted. This is plain from the language of section 194 which, in the case of a *contested* election, permits a disclaimer before the election

1881. is complained of. Until it was complained of it was not a *controverted* election. It was a contested election from the day of nomination.

Smith
v.
Petersville.

The effect of the disclaimer is given by section 195, which declares that it shall operate as a resignation, and the candidate having the next highest number of votes shall become the councillor, &c.

The defendants contend that by this language the statute only advanced the next lowest on the poll book one step. An advance which would be perfectly useless where, as here, he is already elected. The reasons for confining the terms of the statute in this way were ably stated by Mr. *Hodgins*, as having regard to the freedom of election and the rights of a majority, and that a candidate who did not have the majority of the votes polled should not be allowed to hold office. There seems to have been 355 votes polled and the plaintiff did not have a majority; but the same result might follow upon the defendants' construction.

Judgment.

The object of the Act seems to be to prevent the necessity for a new election upon a disclaimer, and thus avoid the expense that must necessarily be incurred, and for that purpose to bring into the council one not already in it in the place of the disclaiming councillor, and therefore the next highest number of votes, must mean the highest after the votes that elected councillors. This would seem to be indicated by the language of the section, which says that the *candidate* having the next highest number of votes shall then become councillor. The two immediately below *Grant* were no longer candidates—they were councillors, and the person referred to in the section was to *become councillor*—but these were already councillors, and the only way to give full effect to the words of the statute seems to me to be by holding that the plaintiff, under the circumstances, became councillor.

The defendants must, therefore, be restrained from excluding the plaintiff from the office of councillor till

hearing or further order The plaintiff will, of course, have to make the necessary declaration to qualify himself.

1881.

Smith

v.

Petersville.

With regard to *Evans*, if he had contented himself with disclaiming all right to the office before bill filed, and perhaps without notifying the plaintiff, he would have been entitled to his costs. But he has necessitated the giving notice to him of this motion by claiming the benefit of a demurrer to the bill. As he had in fact disclaimed, I will not make him pay costs, but having demurred and failed, I will not give him costs.

Judgment.

The plaintiff is entitled to an injunction against the other defendants with costs.

1881.

MOORE V. BUCKNER.

Arbitration—Award—Jurisdiction—Time for enforcing award—Costs.

In answer to a bill to enforce an award, the defendant by answer submitted to the Court a number of matters as objections to the award, and a reference back to the arbitrator, with certain instructions on a reference to the Master as to the matters in dispute. At the hearing on bill and answer, the defendant objected, (1) to the jurisdiction of the Court, the submission, providing that the submission and award should be made a rule of the Queen's Bench or Common Pleas; (2) that the filing of the bill was premature, the time for moving against the award not having expired: *Held*, that a proceeding to enforce an award by summary application, must be taken after the time for moving against it has elapsed; and

Quere, whether a proceeding for that purpose by action at law or suit in equity, can be taken before that time.

Held, also, that the objection to the jurisdiction would have prevailed if properly taken as the parties to the submission had agreed upon their forum; but the defendant, having submitted to the jurisdiction by his answer, and himself asked the intervention of the Court, could not now be heard to object. It not appearing that there was any good reason for filing a bill instead of proceeding in the usual way, the Court [SPRAGGE, C.] refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the reward under the statute.

Hearing on bill and answer. The facts appear in the judgment.

Mr. *McClive* for the plaintiff.

Argument. Mr. *Plumb*, for the defendant. The bill is premature. The time for moving against the award has not yet elapsed. Besides, the plaintiff might, in an inexpensive manner, have made a summary application to one of the Courts of Common Law to enforce the award as stipulated for by the submission.

Mr. *McClive*. We have instituted proceedings in this Court to obtain our rights, which cannot be

enforced by summary motion as part of the relief given by the award cannot be obtained at law : *Russell on Awards*, 5 ed. pp. 521, 549. Under the Administration of Justice Act this Court has all the jurisdiction necessary to afford the plaintiff relief.

1881.

Moore
v.
Buckner.

In addition to the authorities mentioned in the judgment, *Grant v. Eastwood (a)*, *Roddy v. Lester (b)*, *Russell on Awards*, 653, were referred to.

SPRAGGE, C.—The bill is to enforce an award. The answer objects to the award on grounds which appear to me not to be tenable, and the plaintiff has, for that reason as I suppose, set down his cause to be heard on bill and answer. At the hearing counsel for the defendant appear and object to a decree; not on any grounds raised by the answer, but upon two other grounds, one that this Court has not jurisdiction, the submission to arbitration providing that the submission and award might be made a rule of the Court of Queen's Bench or Common Pleas; the other, that the filing of the bill was premature; the time within which the award might be moved against by either party not having elapsed when the bill was filed.

Judgment.

It appears by the authorities that the limited time for moving against an award does not apply to the enforcing of an award; or to bringing an action upon the award, or in a proper case enforcing it by bill in equity. All these courses may, of course, be taken after the time for moving against the award has elapsed and I should say must be taken after that time, where the proceeding is by summary application. I find no authority, one way or the other as to whether an action may be brought or bill filed before that time has elapsed.

I incline to think that the other objection would prevail, if taken properly and in due time, inasmuch as it may well be assumed to be a term of the agree-

(a) 22 Gr. 563.

(b) 14 U. C. R. 259.

1881. ment to refer to arbitration at all, that the award should be dealt with only in the Court, and in the mode provided for in the agreement to refer.

Moore
v.
Buckner.

These objections however are objections to the jurisdiction; not that this Court has not jurisdiction to enforce awards in proper cases, but that the parties had chosen their forum. Still being in this way objections to the jurisdiction, they are matters which in England would be objected to by plea in abatement; and in this court would be properly objected by demurrer, or answer, according to whether or not the objections appeared upon the face of the bill. In this case the defendant takes no objection to the jurisdiction, but submits for the consideration of the Court a number of matters which he sets out as objections to the award; and concludes with submitting that the award ought to be referred back to the arbitrator, with certain instructions; or that a decree should be made referring a certain agreement between the parties and the matters in dispute between them to the Master. After thus submitting to the jurisdiction, and invoking the intervention of this Court, the defendant cannot in my opinion make at the hearing the objections that he now makes, to the cause being heard and disposed of by this Court. The plaintiff ought however to be allowed only such costs as he would have been entitled to, if he had proceeded to enforce the award under the statute. He gives as his reason for filing this bill, that the arbitrator exceeded his authority in awarding to the defendant the costs of a suit by the plaintiff which was pending when the submission was made. But I do not see how that can be a valid reason for filing this bill. If this excess of authority vitiated the award it would be an objection to enforcing it in any way. If on the other hand the effect would be to make the award only bad *pro tanto*, it would stand as an award good in part and bad in part; and the bad part being separable from the good parts of the

Judgment.

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award, the award may be enforced so far as it is a good award, upon motion under the statute. *Faulkner v. Saulter* (a), and *Jones v. Reid* (b), are authorities upon this point, and *In re The City of Toronto and Leak*, may be cited as one among many authorities for the proposition that an award may be good and may be enforced at law as to part; although as to other parts, they being separable, it may be bad.

Moore
v.
Buckner.

(a) 1 Prac. Rep. 48, 247.

(b) 1 Prac. Rep. 472.

(c) 23 U. C. R. 223.

1881.

RIPLEY v. RIPLEY.

Dower—election—Waiver.

The testator bequeathed to his widow for life an annuity of \$60, payable by his son J., his heirs, &c., together with all and singular his household furniture, &c., and in the event of his widow remaining in the dwelling-house on the premises after his decease, she was to have the free use of certain rooms therein; and in case of sickness while there this son was to see that she had proper medical attendance and nursing. This annuity as well as the other bequests the testator charged upon the lands in question, and devised the same so burthened to his said son, the defendant.

The widow filed her bill for payment of the annuity alone, not claiming any lien on the land in respect of the charges created in her favor by the will or for dower. The usual decree for payment or in default sale was made, with reference to the Master at Hamilton, under which the land was sold, without any reference to dower or the other charges, and the purchase money was paid into Court. In the Master's office the widow made no claim, either for dower or in respect of the other charges; but she afterwards presented a petition to have it declared that she was entitled to dower in the land and to compensation in respect of the bequests above set out, and prayed that a sum in gross out of the money in Court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation for the other benefits.

Held, following *Murphy v. Murphy*, ante volume xxv., page 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in Court; but that by her acquiescing in the sale of the land, and by her laches, she had waived her right to any compensation for the loss of the benefits bequeathed to her.

The bill in this case was filed by the widow of *Francis Ripley*, for the purpose of enforcing payment of an annuity of \$60 per annum bequeathed to her by her husband's will.

Statement. By the first clause of the will the testator devised to the defendant his farm, being composed of the easterly half of lot No. 14, in the 7th concession of the township of Saltfleet, charged with certain legacies in favour of another son and the daughters of the testator, and also with a provision in favour of the plaintiff.

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The provision in her favour was expressed in the will as follows:—"I will and bequeath to my beloved wife *Mary Ripley* an annuity of \$60, lawful money of Canada, during her lifetime, payable by my said son *John Ripley*, his heirs and assigns, (payable at the end of each year during her lifetime, commencing with the first year's payment one year after my decease,) together with all and singular my household furniture, beds and bedding of every description, excepting one bedstead with feather bed and bedding which I give to my said son *John Ripley*; and should my said wife see fit to remain in the dwelling house on the premises after my decease, I order that she shall have free use of the sitting-room and the south-east corner bed-room, and in case of sickness while she remains in said apartments, that my said son shall see that she has proper medical attendance and nursing; that he shall furnish her with firewood for one stove." The annuity, as also the other bequests, the testator charged upon the land in question in the cause, and the same so burthened he devised to his son the defendant.

1881.

Ripley
v.
Ripley.

Statement.

No relief, other than payment of arrears of annuity was prayed for in the bill. The cause was heard *pro confesso*, and the usual decree pronounced for payment, or in default sale of the land charged with the annuity. The land was sold under this decree, and the purchase money paid into Court, the plaintiff making no claim meantime for dower, or to any benefit other than the annuity under the will.

The plaintiff now filed her petition praying for a construction of her husband's will, and for declarations that (1) she was entitled to dower in the land sold, or a lien upon the purchase money in respect thereof; (2) that besides the annuity she was entitled to the other benefits mentioned in the foregoing paragraph of the bill.

Mr. *Black*, for the petitioner. The widow is not bound to elect in this cause. There is no intention, express

1881. or implied, that the gifts contained in the will are to be in lieu of dower: *Birmingham v. Kirwan* (a), *Lawrence v. Lawrence* (b), *Holditch v. Holditch* (c). This case is not distinguishable from *Murphy v. Murphy* (d). See also *Fairweather v. Archibald* (e), *Lapp v. Lapp* (f).

Ripley
v.
Ripley.

Mr. R. Martin, Q. C., and Mr. Watson, for subsequent incumbrancers. The widow is bound to elect: *Becker v. Hammond* (g), *McLennan v. Grant* (h), *Coleman v. Glanville* (i), *McGregor v. McGregor* (j). But whether bound to elect or not, the widow has, by her proceedings, lost her right. She filed her bill for the annuity alone, and will be taken to have waived her other rights, if any, under the will.

Mr. Black, in reply. The right to dower is a legal right, and the time within which it will be barred is fixed by the Statute of Limitations. The plaintiff might release her dower, but within the time fixed by the statute she cannot waive by simply non-claim. With respect to the other benefits under the will as well as dower, the plaintiff acted under a mistake as to her rights in not claiming them in the first place, and is not now precluded from asserting them: *Smith v. Drew* (k).

Judgment. SPRAGGE, C.—There are two questions in this case: one, whether it is open to the plaintiff to claim dower after the proceedings taken by her in this suit for the recovery of the annuity bequeathed to her by her husband's will; the other, whether she is entitled to dower if she is not concluded by the proceedings taken by her. If the question of dower be now open, I incline to think her entitled. The case does not seem

(a) 2 Sch. & Lef. 452.

(c) 2 Y. & C. 22.

(e) 15 Gr. 225.

(g) 12 Gr. 485.

(i) 18 Gr. 42.

(k) 25 Gr. 88.

(b) 2 Vern. 365.

(d) 25 Gr. 81.

(f) 16 Gr. 150.

(h) 15 Gr. 68.

(j) 20 Gr. 450.

distinguishable from *Murphy v. Murphy* (a), and the cases therein referred to. The claim for compensation for use of rooms (assuming the question to be open) may rest upon the same footing, but there may be reasons for holding the plaintiff concluded as to that claim even if not concluded upon the question of dower.

Since making the foregoing note I have considered further the points to which I have referred, and I have come to the conclusion that I ought not to hold the plaintiff concluded from asserting her right to dower, by the proceedings that she has taken in this suit. I think it is a proper inference from all that has occurred, that she did not assert her right to dower in this suit in the belief, perhaps under the advice of counsel, that she was not entitled to the provision made for her by her husband's will and also to dower. Her so abstaining would not extinguish her right to dower if she had such right. It is not a case in which the maxim *ignorantia juris haud excusat* applies. I had to consider the application of that maxim in *Smith v. Drew* (b). I think also that the plaintiff taking these proceedings, and being silent as to her dower, cannot be taken to be an abandonment of her dower. There could be no intention to abandon that of the existence of which she was ignorant. She acted simply under a mistake as to her rights; and as neither the position of the devisee nor of the mortgagees was changed by reason of her mistake, there seems to be now no sufficient reason for denying her right to litigate this claim. Further, it is to be borne in mind that dower is a legal right which the dowress may litigate either in this Court or in a Court of law, and the money now in Court represents what was that legal right of the plaintiff, if entitled to dower; and that right is paramount to that of the devisee and his chargees.

Upon the question of the plaintiff being entitled to

1881.

Ripley
v.
Ripley.

Judgment.

(a) 25 Gr. 81.

(b) 25 Gr. 168.

1881. dower as well as to the provision made for her by will, my opinion is that this case is governed by the case of *Murphy v. Murphy* (a), and the English cases upon the authority of which that case was decided.

Ripley
v.
Ripley.

The petitioner prays also that she may be declared entitled to an allowance in respect of a provision made for her in her husband's will in the following terms: "And should my said wife see fit to remain in the dwelling-house on the premises after my decease, I order that she shall have the free use of the sitting-room, and the south-east corner bedroom, and in case of sickness while she remains in said apartments, that my said son *John* shall see that she has proper medical attendance and nursing: that he shall furnish her with firewood for one stove."

Judgment.

The bill is silent as to this provision, as well as silent as to dower, and the decree is also silent as to both. The advertisement for sale was settled and issued without reference to the existence of either; and the claim as to both is made for the first time by this petition. The whole of the proceedings, including the sale, have been conducted by the plaintiff.

Why this has been, I do not know. This claim, as well as the claim to dower, should have been brought forward at the latest in the Master's office, when, upon the default of the devisee to pay the arrears of the annuity, it became apparent that they would have to be realized by sale. If presented then it would have been for the other parties interested to consider whether they would contest them, and how, in the event of their being established, the property could be best brought to a sale. As I understand, the advertisement was settled without either of these claims being presented by the plaintiff; and I should say in the belief probably that the only claim of the plaintiff was that which was presented, viz., her claim as an annuitant.

(a) 25 Gr. 81.

They might indeed have put it to her to say, whether she intended to avail herself of the option she had under the will, of the personal use of the sitting and bedroom appropriated to her by the will if she saw fit to use them. They probably assumed that she did not; and I think they might reasonably infer that if she had so intended, she would not have proposed for their adoption a simple advertisement of sale without mention of the property offered for sale being subject to any easement; and without even bringing as a fact to their notice that she claimed the easement that she claims now.

I take it to be almost certain that if she had made her claim then, it would have given occasion to discussion upon some two or three points. First, as to the fact whether she had seen fit to remain in the dwelling-house after the death of her husband, and so had exercised the option which the will gave her, a fact which I do not find stated one way or the other upon any papers before me. Next, what were her intentions for the future. Whether to act or not to act upon the option given her by the will; and next, what, if anything, she, conducting the sale, had to propose to the other parties interested in regard to that provision of the will.

It is clear that her rights under that provision could not be affected by the default of the devisee in the payment of her annuity; and that she had a right to realize payment by sale, without impairing her right; but her obviously proper course, if she desired to preserve her right, was to offer the property for sale subject to her right. She was forcing a sale of the property to realize her annuity. The land upon sale for that purpose would necessarily pass into the hands of a stranger. Her right was a purely personal one to occupy two certain rooms. She could not convert that right into a money payment; and if she had proposed it before the sale, the other parties interested in the

1881.

Ripley
v.
Ripley.

Judgment

1881.

Ripley
v.
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property might have opposed it. She did not in the matter of the sale put her right in the only shape in which she was entitled to put it; and she cannot do now what she could not do then. It may well be that if she had proposed before the sale to have a money equivalent for this personal easement, and it had been objected to, that she would have preferred to forego the use of the rooms rather than have their use in the house of a stranger. We cannot see now what would have occurred if the plaintiff had taken that course, which was certainly the proper one, if she desired to retain her right to use these rooms, assuming that she had the right; but this appears to me to be clear, that if she can now claim a money equivalent in lieu of her easement, she will be placed in a better position, and the other parties interested will be in a less advantageous position than would have been the case if she had disclosed her case, and made her claim at the time when she ought to have made it.

Judgment.

All parties now agree that the sale was at a good price; and all think that it would be very injudicious to disturb it. I see no way of placing the parties in the same position as they were in when in the Master's office before the sale, other than that of setting the sale aside, and settling a new advertisement making the sale subject to this optional easement in favour of the widow. But I apprehend that doing this would probably be to the detriment of the parties interested, other than the widow. It is, at any rate, impossible to say that it would not be so. It would not be just to place those other parties in a position of disadvantage, in order to give to the plaintiff rights which she failed to claim at the proper time, and which it may be she would not at that time have claimed at all, if at that time the question had been raised. It is not necessary to arrive at the conclusion that she abstained advisedly from making her claim at the proper time in order to obtain a money equivalent for it after the sale. It may have

been so, or it may not; but if any one is to suffer from the omission it ought to be the person who, if the claim was intended to be made, was guilty of a neglect of duty in not making it; and not those upon whom such duty was not cast, and who may probably be prejudiced if that which was then done by the widow be now undone for her benefit.

1881.

Ripley
v.
Ripley.

The result is, that the plaintiff is not, in my judgment, barred of her right to recover dower, or its equivalent; and that her claim in respect of her easement cannot now be sustained. She succeeds then as to part of the subject matter of her petition, and fails as to the other part, and there should be no costs to either party.

Judgment.

As to the equivalent for dower. I think the widow is bound to accept it either in the shape of an annual payment of interest upon one-third of the purchase money, or in a gross sum calculated upon her age and state of health, whichever the incumbrancers may think most for their interest.

(It may probably be difficult to place it in the former shape as the purchaser has paid his purchase money, and the dower cannot remain a charge upon the land.)

1881.

SOMMERVILLE V. RAE.

*Fraudulent conveyance—Contradictory statements—Estoppel—
Correcting deed by grantee after execution.*

H. obtained from his debtor an absolute conveyance of land as security, which was attacked by the plaintiff, who had subsequently recovered an execution against the grantor, as being a fraudulent preference. It was shewn that the deed, after its execution, had been altered by the grantee so as to convey the correct lot (22 instead of 122), the only lot owned by the grantor; but no re-execution or acknowledgment took place; the grantor, however, accepted a lease from *H.* of the correct lot, which he afterwards surrendered to *H.*

Held, that as the grantor, according to the ruling in *Sayles v. Brown*, ante page 10, could not claim to have the conveyance vacated, so neither could his creditor, the plaintiff.

H. insisted that the conveyance to him was *bonâ fide*, while the grantor alleged it had been obtained by the fraud of *H.*, the Court [BLAKE, V. C.,] in view of the fact that the grantor in another suit had sworn that it was made for a valuable consideration and in good faith, refused the relief asked; the other circumstances in the case being such as not to justify a decree on the grantor's present statements, although not estopped by the first statement, but that he was at liberty now to present the facts otherwise. In such a case the explanations given for the different account of the transaction must be convincing.

Under these circumstances, and *H.* claiming to hold the land only as security for the amount due him, and the Court being satisfied of the *bona fides* of the transaction, ordered an account to be taken of the amount due *H.*, and the land to be sold; the proceeds to be applied first in payment of the amount due to *H.* for principal, interest and costs, and the balance as in ordinary fraudulent conveyance cases; and for these purposes the usual reference to the Master was directed.

In this case the plaintiff filed his bill as a judgment creditor of the defendant *Hugh Rae*, seeking to set aside a conveyance made by him to his co-defendant *Hugh Humes Rae*, as being in fraud of creditors. It was shewn that after the conveyance had been executed, the defendant *Hugh Humes Rae* made a lease of the property to the defendant *Hugh Rae*, for five years. The bill charged that this lease and the possession of *Hugh Rae* under it were a part of the scheme

Statement.

to blind and defraud creditors. The bill was taken *pro confesso* against the defendant *Hugh Rae*, but the defendant *Hugh Humes Rae* answered, denying all the charges of fraud, and claiming that the deed and lease had been executed for valuable consideration, but that the lease had been subsequently surrendered, and that the defendant *Hugh Humes Rae* was in possession of the property.

1881.

Sommerville
v.
Rae.

The cause came on for hearing at the Spring sittings at Stratford, in 1880, and the evidence then taken shewed that the conveyance had originally been of lot 122, and not of lot 22, which was the only lot owned by the defendant *Hugh Rae*. The plaintiff then sought to shew that the deed had been fraudulently altered, but the Court refused to try that issue upon the record as it then stood, and the cause stood over with liberty to the plaintiff to amend his bill. The bill was accordingly amended so as to set up that the defendant *Hugh Rae* was a man of small intelligence and unfit to transact business at the time of the conveyance to his co-defendant, but that his co-defendant, with the object of acquiring the lands of the defendant *Hugh Rae* for himself, and also of defeating and delaying the creditors of *Hugh Rae*, had procured that defendant to execute to him a conveyance of his lands. It further charged that "the defendant *Hugh Humes Rae* materially altered the description in the deed of conveyance by filling in the whole of the said deed after the same had been signed by the said *Hugh Rae*, and after so filling in the same as aforesaid, he again materially altered the said deed, without in either case being authorized so to do, and without having the said deed again executed by the said defendant *Hugh Rae*, and after the witness to the said alleged deed had been sworn to the affidavit of the execution thereof." The amended bill further charged that "lot 22 was not conveyed by the pretended deed, but that it was in the power of the defendant *Hugh Humes Rae*, and

Statement.

1881. that he could, unless restrained, convey to some innocent purchaser for value without notice of the invalidity of the conveyance."

Sommerville
v.
Rae.

The defendant *Hugh Humes Rae* denied the fraud, but admitted that the description had been changed so as to describe the correct lot after the execution by *Hugh Rae*, and claimed that *Hugh Rae* had expressly ratified the deed subsequently.

The cause again came on for hearing at the Autumn sittings at Goderich.

Mr. *Harding* for the plaintiff.

Mr. *Idington*, Q. C., and Mr. *McMillan*, for the defendants.

Feb. 21.

BLAKE, V. C.—On the evidence there can be no doubt that an indebtedness is established from *Hugh Rae* to *Hugh Humes Rae*. An instrument is produced which purports to be a conveyance of the land in question for value, from *Hugh* to *Hugh Humes Rae*, dated the 19th November, 1878; and another instrument is produced bearing the same date, which purports to be a lease from *Hugh Humes Rae* to *Hugh Rae*, with a limited right of purchase, on the back of which lease is a surrender thereof by *Hugh Rae* to *Hugh Humes Rae*, to which is added the clause, "and the said *Hugh Rae* hereby surrenders all his right, title, and interest in the said lands, and the lease thereof." This is dated the 18th March, 1879. Subsequently to this period the plaintiff recovered judgment against the defendant *Hugh Rae* and placed an execution in the hands of the sheriff, and now alleges that he is impeded in the recovery of this claim by the above instruments, which he alleges to be fraudulent and void.

Judgment.

On a former occasion a creditor, *John Moore*, attacked the same transaction, and in answer to such charge, after alleging a *bonâ fide* debt and setting

1881.

Sommerville
v.
Rae.

out the instruments above referred to, the defendant *Hugh Rae*, in the 6th and 7th clauses of his answer, alleged as follows: "6. The said conveyance to my said co-defendant was made for the consideration hereinbefore mentioned, and was made in good faith, and not in pursuance of any fraudulent scheme, or for any fraudulent purpose, or with any fraudulent intent whatsoever; and no fraudulent scheme such as is alleged in the said bill, or other fraudulent scheme of any kind was entered into between my said co-defendant and me. 7. The said indebtedness from me to my said co-defendant was an actual and *bona fide* debt due by me to him, and was not a pretended consideration, and it was not agreed between my said co-defendant and me that I should convey the said lands to him for a pretended consideration, or for the purpose of delaying or defrauding my creditors, or any of them, and the said conveyance was not made in pursuance of any such agreement, or with any such intention or object."

Judgment.

This defendant in the case before me, if credit is to be given to him, did not collude with the co-defendant; did not with him overreach, or seek to overreach his creditors, but he was over-reached by *Hugh Humes Rae*, and as the result of this fraud we have the conveyances produced. The evidence of both of these co-defendants negatives any collusion on their part to defraud creditors. *Hugh Humes Rae* persists in the *bona fides* of the transaction, while *Hugh Rae* alleges that the co-defendant obtained from him the instrument complained of by fraud. If *Hugh Rae* had never given any other account of the transaction, I should have felt inclined, looking at the fact that he is a dull heavy man, and *Hugh Humes Rae* a sharp, and I should judge not overscrupulous man, to have found that in ignorance of what he was doing *Hugh Humes Rae* had procured this conveyance from him. The question would then have remained for

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1881.
Sommerville
v.
Rae.

decision whether, when there is an actual debt, and the grantee thus procures a conveyance from the grantor, a creditor has the right to set aside, *in toto*, such a transaction. But after going over the evidence, many times, I am not able to say that I should give such credence to the evidence of *Hugh Rae* now as to conclude this fact is proved. I am aware that this statement does not estop the witness from presenting the facts otherwise, but the explanation given for the different story now told must be convincing. Such was the case in *Washburn v. Ferris* (a), where the promoter of the act sought to take advantage of it in the suit. Here I am not satisfied at all with the reason assigned, and find as a fact that *Hugh Humes Rae*, a creditor, obtained from his debtor this conveyance in order to secure his debt; that the debtor intended to give such conveyance, and knowingly gave it; and as the transaction cannot be attacked under the insolvent laws, although a preference, yet being for a *bond fide* debt which was actually to be secured, it stands.

Judgment.

It is true that the land at first described was lot 122, and that the lot actually owned by the debtor was 22, and that after the deed was executed this was altered from 122 to 22, and the instrument was not thereafter re-executed or acknowledged. Presuming, for the sake of argument, that a creditor has the right to attack such a transaction, he cannot stand in any better position in this respect than his debtor. If I am correct in the main facts in the case the debtor intended to convey lot 22 to his creditor. The deed as executed did not carry out this intention, and to make it do so this alteration was made. Thereafter a lease of the premises was accepted, and subsequently a surrender of the lease and premises given. It was subsequently to this that the right of the creditor arose by placing the execution in the hands of the sheriff. I think the

(a) 14 Gr. 516, and 16 Gr. 76.

cases referred to in *Sayles v. Brown* (a), shew that the grantor could not have had the conveyance vacated on this ground, and if so the creditor cannot succeed on this point.

1881.

Sommerville
v.
Rae.

The plaintiff is entitled to have the amount due *Hugh Humes Rae* ascertained by the Master, and to a sale of the lands, *Hugh Humes Rae* adding his costs to his claim. The other creditors will be notified in the Master's office, as is usually done in fraudulent conveyance cases. The defendant *Hugh Humes Rae* did not contend that he held the lands except as security for the amount due him, and expressed his willingness to have the account taken and his debt, which will be the first charge (after the mortgages) paid out of the land.

Judgment.

(a) 27 Gr. 10.

1881.

IN RE TRELEVEN & HORNER.

Vendors and Purchasers' Act, R. S. O. ch. 109—Description of land conveyed—Assent to sale by tenant for life—Appointment of interested trustee—Practice.

A description of land in a deed, by reference to other conveyances for fuller description, is sufficient.

Land was settled on a trustee, in trust for the use of *H.* till marriage, and then upon other trusts for the husband and wife as tenants for life, and ultimately providing for the issue; the assent of the tenant for life was necessary for a sale; and there was power in the deed to appoint *H.* as a trustee on the original trustee refusing, &c. to act. The trustee had an absolute discretion as to forfeiting and applying the estate among or for the benefit of the parties to the deed in case of anticipation or attempted anticipation.

Held, that the consent of *H.* and his wife, as tenants for life, satisfied the condition as to the assent in case of a sale; that *H.*, as trustee, was entitled to receive the purchase money, and that the purchaser was not bound to see to its application.

But it having been suggested by the Court that the appointment of *H.*, as trustee, was not one which the Court would have made, the matter again came on for argument, when it was

Held, that *H.* was placed in a position in which his interest as one of the parties to the deed upon forfeiture might conflict with his duty as trustee, and that the Court would not have made and could not sanction his appointment.

Though on a bill filed for specific performance, if the infant children ultimately entitled under the settlement were made parties, the Court might order the completion of the sale and payment of the money into Court for investment, where the *corpus* of the estate would be protected for the children, yet on application under the *Vendors and Purchasers' Act*, in the absence of the other parties to the settlement, it would not compel the purchaser to accept the title.

This was an application under sec. 3 of *R. S. O. ch. 109*, made by *Herbert Horner*, the vendor of the land in question in respect of certain objections to title raised by the purchaser *Joseph Denis Treleven*.

Herbert Horner, on the occasion of his marriage had, by indenture bearing date the 12th September,

1878, conveyed the land in question to *John Angel* 1881. *Cull*, in trust until marriage, for the benefit of himself, and after the solemnization of marriage, in trust for the joint benefit of *Herbert Horner* and his wife. The instrument contained many cumbersome clauses and some very peculiar ones, which occasioned the difficulties complained of in this application by the purchaser.

*Re Treleven
and Horner.*

By indenture of 31st December, 1880, pursuant to express power contained in the settlement, the said *John Angel Cull* nominated and appointed *Herbert Horner* to be trustee in his room and stead, and by the same instrument *Cull* conveyed to *Herbert Horner* the land in question, to be held by him upon the trusts contained in the settlement of the 12th September, 1878.

On the 18th March, 1881, *Herbert Horner* entered into an agreement with *Treleven* to sell the land to him, when upon searching the title and examining the marriage settlement, the purchaser refused to carry out the contract.

Statement.

The following were the objections to title raised by the purchaser and resisted by the vendor:—

1. "That under the marriage settlement dated the 12th day of September, 1878, and made between the said *Herbert Horner*, of the first part, *Maude Field Cull*, of the second part, and *John Angel Cull*, of the third part; and under the indenture dated the 31st day of December, 1880, and made between the said *John Angel Cull*, of the first part, the said *Herbert Horner*, of the second part, and the said *Maude Field Horner* (nee *Cull*), of the third part, the said *Herbert Horner* cannot convey an estate in fee simple in the said lands, because it is requisite to obtain the consent thereto of the tenant for life, and the said *Herbert Horner* and *Maude Field Horner* are not the tenants for life, and there is nothing to shew who is the tenant for life; and because the power of sale in the said marriage

1881. settlement is ambiguous, and the power of sale is not absolute."

*Re Treleven
and Horner.*

2. "The said *Herbert Horner* claims to be paid the purchase money, and under the said marriage settlement it is uncertain whether the said *Joseph Denis Treleven* would be obliged to look to the application of the purchase money, or whether he would take a conveyance of the said land free from the trust and of all obligations under the said marriage settlement."

3. "The description of the land in several of the deeds is by reference to other prior title deeds, instead of describing the lands by metes and bounds as in the prior title deeds. These are insufficient descriptions."

Herbert Horner thereupon filed a petition under the Act praying for a declaration that he had power to sell the land in question, and give a good title to the same.

Mr. *Black*, in support of the application. (1) *Horner* stands in a double relationship towards this land—he is trustee and *cestui que trust*. In the latter character he and his wife are the joint tenants for life of this property by the express terms of the settlement. The consent of both of these parties is given to this sale, which disposes of the first objection. (2) It is clear that the purchaser is not bound to see to the application of the purchase money. The deed itself provides against that in express terms, and see R. S. O. ch. 107, sec. 7. (3) The description contained in the deed by referring to the description of the same land by metes and bounds contained in another prior deed registered on the same lot, is a good and sufficient description: *Broome's L. M.*, 5th ed., 624, Fry p. 93; *Leith's Blackstone*, 259; *Nolan v Fox* (a).

Argument.

(a) 15 P. C. 568.

Mr. *McMichael*, Q. C., for the purchaser. The purchaser is anxious to carry out this contract if the Court should think the objections raised are not well founded. Counsel then read over parts of the marriage settlement and contended that it was of such a peculiar character and doubtful meaning, that the purchaser would not be safe in taking title under it.

1881.
Re Treleven
and Horner.

BLAKE, V. C.—*Herbert Horner* settled the property in question on the trusts declared in the instrument of the 12th September, 1878. *John Angel Cull* was the trustee to whom the property was conveyed to the use of *Horner* until marriage, then to the use of him and his wife during their joint lives, &c., with a power of sale on consent of the tenant for life, to hold the proceeds on the same trusts. There then followed this peculiar provision: "Provided always and it is hereby agreed and declared that notwithstanding the trusts hereinbefore mentioned, the said lands and premises, and the said goods and chattels shall be held by the said *John Angel Cull* upon the further trust in case of anticipation or attempted anticipation on the part of both or either of the said *Herbert Horner* and *Maude Field Cull*, or any one claiming or to claim by them, or under them, or both or either of them, to enter into possession of the said lands and premises, and the said goods and chattels, and possess himself of the whole thereof, and hold the same lands, goods, and chattels to such uses and trusts as he in his sole discretion shall determine, but for the benefit of such one of such parties, any child or children thereof as he in the exercise of such his discretion doth determine."

Judgment.

I have read over the petition in this case, and the settlement and appointment, and find as follows:

(1) In answer to the first question: the consent of *Horner* and his wife satisfies the condition as to the assent of the tenant for life being needed before the sale can be made.

1881. *Re Treleven and Horner.* (2) *Herbert Horner* is entitled to receive the purchase money, and the purchaser is not bound to see to the application thereof.

(3) The description of the land, by reference to other conveyances for fuller description, is sufficient.

On the case presented by the petition, the purchaser is bound to accept the title, but I deem it right to say that I have not considered whether the appointment of *Herbert Horner*, who has entered into certain covenants as to the settled estate with the former trustee, and who has, as present trustee, the right to declare the estate forfeited by anticipation in his own favour and thereby possess himself of the estate, who can, standing as judge in his own case, cause the estate to revert into the hands of himself, the author of the trust, is a good appointment.

It may be that the learned counsel for the purchaser considered that as he could have inserted a clause of *revocation*, he could have contracted for the exercise of this present right which does not terminate so completely the trust.

There is no doubt the Court would not have named *Herbert Horner* as trustee, but it is quite another thing where the settlement permitted it, and outside of the Court the appointment has been made: See *Foster v. Abraham* (a), *Re Tempest* (b), *Sugden on Powers*, 889; *Perry on Trusts*, sec. 59; *Wilding v. Borden* (c), *Passingham v. Sherborn* (d).

NOTE.—On a subsequent day at the request of counsel for the purchaser, the matter was re-argued before the same learned Judge on the point raised by his Lordship in the judgment. His Lordship then refused to compel the purchaser to accept the title on the ground mentioned in his judgment, holding that the vendor, by the conveyance to himself of the trust estate, was placed in a position in which his interest as one of the parties to the settlement, upon forfeiture, might conflict with his duty as trustee, and that the Court would

(a) L. R. 17 Eq. 351.

(b) L. R. 1 Ch. 485.

(c) 21 Beav. 222.

(d) 9 Beav. 424-26-27-32-35-36.

not have made, and would not sanction his appointment. On a bill for specific performance, the infant children ultimately entitled being made parties, the Court might decree the completion of the contract. But in such case the purchase money would be ordered to be paid into Court where it could be invested for the benefit of all parties entitled. On a summary application of this kind, in the absence of the other parties to the settlement, it would not compel the purchaser to complete the title.

1881.

Re Treleven
and Horner.

SMITH V. THE MERCHANTS' BANK.

*Insolvency—Bills of lading—Warehouseman—Warehouse receipts—
Mixing goods deposited.*

By the Act 34 Vict. ch. 5, (D.) it is not necessary to the validity of the claim of a bank under a warehouse receipt, that the receipt should reach the hands of the bank by indorsement; the bank itself may make the deposit and receive from the warehouseman the receipt.

A bank had discounted for a trading firm, on the understanding that a quantity of coal purchased in the United States by the firm should be consigned to the bank, and that the bank would transfer to the firm the bills of lading, and should receive from one of the members of the partnership his receipt as a wharfinger and warehouseman for the coal as having been deposited by the bank, which was accordingly done. The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents and filed a bill impeaching the validity of the receipt. It appeared that the insolvents had mixed the coal with other coal, and had sold some of it, and that all the coal in the premises was not sufficient to answer the quantity comprised in the receipt. Under these circumstances it was *held*, that the bank had a right as against the assignee—as it would have had against the insolvents—to hold all the coal in store of the description named in the receipt, and also to payment for any such coal as might have been sold by the plaintiff.

The provisions of the 34 Vict. ch. 5, (D.,) as to warehouse receipts do not invade the functions of the Provincial Legislature by an interference with "property and civil rights" in the Province.

The bill in this case was filed by *Robert Hall Smith*, assignee in insolvency of the estate of *John*

1881. *Snarr's Sons*, against *The Merchants' Bank of Canada*, setting forth that in the year 1878, and up to the time of their insolvency, *William S. Snarr* and *George E. Snarr* carried on business as coal dealers in the city of Toronto, under the name or style of "*John Snarr's Sons*," and became insolvent on the 18th of March, 1879, within the meaning of the Insolvent Acts in force in this Province, and the plaintiff under such Acts was appointed the assignee of their estate; that the said firm carried on their business in certain premises in the said city, on the south side of Esplanade street, known as *Myles's Block*, which premises were in 1876 leased to the said *William S. Snarr* for eight years, and were used by the firm as a yard for storing and keeping coal; that at the time of such insolvency a large quantity of coal, the property of the firm, was stored in the said premises, to part of which the defendants claimed they were entitled, and the same, by arrangement, was sold, and the proceeds, amounting to \$7,903.79, had been paid into the bank of the defendants, to be applied thereafter in such manner as the parties claiming such coal should be found by law entitled thereto, but that the defendants refused to institute proceedings for that purpose; that as to a part of such coal the defendants claimed to be entitled to the proceeds thereof under certain warehouse receipts, and also claimed to be recouped out of the residue of such coal for certain quantities of coal covered by and embraced in such warehouse receipts, which had been sold by the firm, the warehouse receipts under which the defendants claimed the proceeds of sale of said coal, having been given by the said *William S. Snarr* as a warehouseman under the provisions of the statute, 34 Vict. ch. 5 (D.), and embraced coal to the value of \$20,150, the defendants contending that such warehouse receipts had been taken by the bank as collateral security for the payment of certain promissory notes held by the bank
- Smith
v.
Merchants'
Bank.*
- Statement.*

and alleged by the defendants to have been discounted for the firm in the regular course of banking business. It appeared that at their instance the coal had been shipped to the defendants, and bills of lading made out therefor in their name, and which the bank transferred and delivered to the firm, who gave to the defendants undertakings in writing to deliver to the defendants their warehouse receipts covering said coal.

The bill further alleged that the warehouse receipts were not given contemporaneously with any of the promissory notes of the firm, and had not been acquired by the bank at the time either of the notes had been negotiated by the firm with the bank, and were therefore void; that the receipts had been given by *William S. Snarr* and not by the firm, although the coal was stored in the yard of which the firm of *John Snarr's Sons* were the keepers, and *William S. Snarr* had not such possession thereof as entitled him to make or give a valid warehouse receipt for such coal, so as to transfer to the holder thereof any interest therein; and that the firm had, in the course of their dealings, sold all the coal mentioned in said receipts, with the exception of about 760½ tons, although at the time of the insolvency there was in the said yard, in addition to such balance, other coal bought from other parties to a large amount; but the defendants never took possession of any of the said coal in any manner.

The bill prayed (1) that it might be declared that the plaintiff as assignee was entitled to the proceeds of said sale; (2) that it might be declared that the bank was not entitled to hold the proceeds of such sale in preference to the other creditors of the firm; the plaintiff submitting as such assignee to pay to the defendants whatever amount, if any, they might ultimately be found entitled to as composition on their claim against the estate.

1881.

Smith
v.
Merchants'
Bank.

Statement.



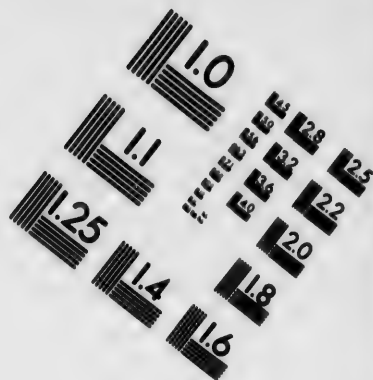
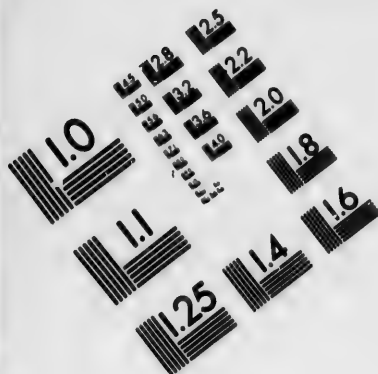
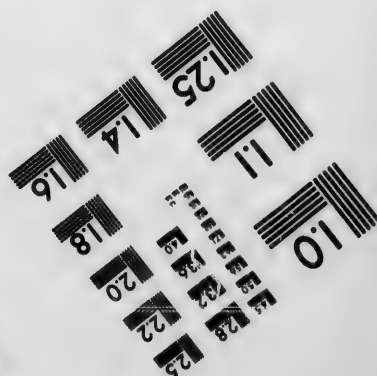
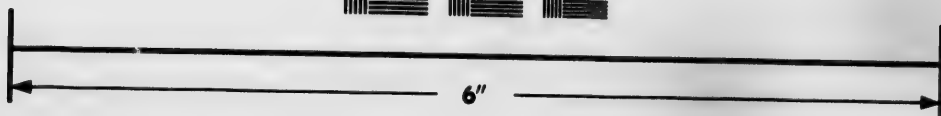
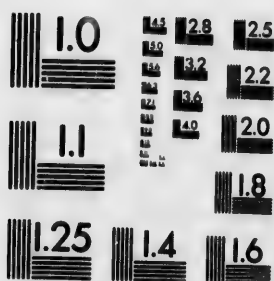


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1881. The cause came on to be heard at the Spring Sittings of 1880, in Toronto.

Smith
v.
Merchants'
Bank.

Mr. *McCarthy*, Q.C., and Mr. *Kingsford* for the plaintiff. The warehouse receipts here taken by the bank as depositors of the coal, were acts not within their corporate powers, being acts of trading, and were such as clearly were not intended to be authorized to be done by the Legislature. See 34 Vict. ch. 5, (D.) the 46th section of which embodies, with some slight variations, the provisions of sec. 8, C. S. C. ch. 54. By the 34 Vict. the Dominion Legislature professedly deal only with banking powers; and the object of the Ontario Legislature—R. S. O. ch. 116—was to assist in accomplishing the same object. The difference in the language of the several Acts may be easily attributed to the different powers of the Legislatures. The 47th section of the Dominion Act should be read in connection with sec. 9 of C. S. C. ch. 54.

Argument.

The 24 Vict. ch. 23, was not intended to confer on banks the power of becoming depositors in the first instance: *Bank of British North America v. Clarkson* (a), *Royal Canadian Bank v. Miller* (b). The provision contained in the 46th section of the Dominion Act vesting the property in the bank, being a question of property and civil rights, was clearly cognizable by the Local Legislature only, and therefore *ultra vires* of the Dominion Parliament. The yard in which this coal was deposited was not a place used for storage; it was simply used and intended to be used for the storage of goods—here it was coal—for sale. The Act, we contend, does not apply to goods the property in which had not yet become vested in the debtor; here the *Snarrs* were to be at liberty to sell, and it must, in determining the rights of parties, be treated

(a) 19 C. P. 182.

(b) 28 U. C. R. 593; S. C. in Appeal, 29 U. C. R. 266.

as if this stipulation had been embodied in the contract itself, and it is shewn that, with the exception of 700 tons, none of the coal was forthcoming. The other coal in the yard was easily distinguishable from that covered by the warehouse receipts, all of which were given in the name of *William S. Snarr*, who in carrying on the business was merely a partner with another. *Cockburn v. Sylvester* (a), *In re Coleman* (b), *Wilmot v. Maitland* (c), *Llado v. Morgan* (d), *Snarr v. Smith* (e), were also referred to.

1881.

Smith
v.
Merchants'
Bank.

Mr. C. Robinson, Q.C., and Mr. J. F. Smith, for the defendants. The bank in their transactions with *Snarr* were not attempting to deal in coal; it was simply a mode of obtaining security for their advances to the firm. See *Robinson & Joseph's Digest*, under heading "Bills of Lading," 568. The original statute provided that banks might take security, and pointed out the mode by which that might be effected, namely, by indorsement over of the bills of lading. The 34 Vict. was passed to remove difficulties as to the dealings of banks; and, in order to define the effect of having the receipts, declares that the "bank may acquire and hold" the property warehoused. In *Suter v. The Merchants' Bank* (f), there was not any actual transfer. All the cases seem to assume that the Acts of both the Dominion and Local Legislatures were not *ultra vires*. It is objected here that *Snarr* was not a warehouseman; but a wharfinger may or may not act as a warehouseman, and *Snarr* combined both these occupations. It is true that the place of deposit was more a yard than a warehouse, but *Milloy v. Kerr* (g), which was affirmed on appeal to the Supreme Court, shews that this was sufficient; and the practice of

Argument.

(a) 27 C. P. 34; S. C. 1 App. R. 471.

(b) 36 U. C. R. 559. (c) 3 Gr. 107.

(d) 23 C. P. 517. (e) *Rob. & Jos. Digest*, 4271.

(f) 24 Gr. 365. (g) 43 U. C. R. 78; S. C. 3 App. R. 350.

1881. millers, when wheat is delivered to them for the purpose of being converted into flour, has always been to grant such receipts, and this course of dealing has never been questioned. *The Royal Canadian Bank v. Ross* (a), shews that although the coal had not actually arrived, *Snarr* could make the transfer to the bank; and here as a fact no money was advanced by the bank before the arrival of the coal. It was intended that the *Snarrs* should sell the coal, but not without the authority and assent of the bank; and they had coals of their own which it was known they did sell, but the officers of the bank had not any reason to believe that they were disposing of that belonging to the bank. As to the mixing of the coals, all that can be said is that the bank was in the same position with the plaintiff as with the *Snarrs*, who clearly could not reap any advantage from their improperly confounding the property. *Lupton v. White* (b); and Mr. *Kent*, in his Commentaries, (vol. 2, p. 365,) enunciates the same principle; so that if *Snarr* disposed of the coal belonging to the bank so that it was not forthcoming, they were bound to make up the deficiency out of their own coal on the terms of the contract required the *Snarrs* to keep the coal separate, so that as soon as they mixed them they became bound to give an equivalent; and applying this principle here, no necessity exists for any reference to ascertain the quantity; the bank can take any kind of the coal specified which they can find on the premises, all being of equal value. Counsel also referred to *Lawrie v. Rathbun* (c), *Great Western R. W. Co. v. Hodgson* (d), *Box v. The Provincial Ins. Co.* (e), *Coffey v. The Quebec Bank* (f), *Hart v. Ten Eyck* (g), *Gilmour v. Buck* (h), *Tilt v. Silverthorne* (i).

Argument.

- (a) 40 U. C. R. 466.
- (c) 38 U. C. R. 255.
- (e) 18 Gr. 280.
- (g) 2 John C. C. at 108.
- (i) 11 U. C. R. 619.

- (b) 15 Ves. 432.
- (d) 44 U. C. R. 187.
- (f) 20 C. P. 120.
- (h) 24 C. P. 187.

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Mr. McCarthy, Q.C., in reply.

1881.

The other material facts in the case appear in the judgment.

Smith
v.
Merchants'
Bank.

SPRAGGE, C.—It was held in the *Royal Canadian Bank v. Ross* (a), that the Dominion Act 34 Vict. ch. 5, does, by sections 46 and 47, authorize the transfer to a bank of bills of lading and warehouse receipts to secure an antecedent debt, in case of there being at the time of the contracting of the debt an "understanding" (the word used in sec. 47) that the bill of lading would be transferred to the bank as collateral security, and it is clear upon the evidence in this case that the moneys advanced by the bank in this case were advanced upon that understanding. I do not understand that there is any question upon that point.

There was a written undertaking given by the insolvents to the bank upon receiving the bills of lading, that they would leave with the bank warehouse receipts covering the coal comprised in the bills of lading. Judgment.

The warehouse receipts were in this form, "Received in store, in Big Coal House warehouse at Toronto, from Merchants' Bank of Canada, at Toronto (so many tons stove coal, and so many tons chestnut coal,) per schooners [naming them], to be delivered to the order of the said Merchants' Bank, to be endorsed hereon. This is to be regarded as a receipt under the provisions of statute 34 Vict. ch. 5. Value \$7,000. The said coal in sheds, facing esplanade, is separate from and will be kept separate and distinguishable from other coal.

"Dated 10th August, 1878.

"W. SNARR."

W. Snarr was a member of the insolvent firm and lessee of the wharf, and of the warehouse, wherein the coal in question was stored.

1881.
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 Smith
 v.
 Merchants'
 Bank.

Mr. McCarthy, for the plaintiff, who is assignee in insolvency, contends that upon the evidence it does not appear that *W. Snarr* was a warehouseman. The words of the Act are: "The bank may acquire and hold any cove receipt, or any receipt by a cove-keeper, or by the keeper of any wharf, yard, harbour, or other place, any bill of lading, any specification of timber, or any receipt given for cereal grains, goods, wares or merchandize stored or deposited in any cove, wharf, yard, harbour, warehouse, * * as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business or for any debt," &c.: 34 Vict. ch. 5, sec. 46, D. The evidence is, that the coal of *Snarr & Co.*, not only the coal in question but other coal belonging to the firm, was stored in the warehouse and on the premises, and that iron from the Rochester Iron Company, and that some stone also had been stored on the same premises.

Judgment. In *The Great Western R. W. Co. v. Hodgson (a)*, the warehouse receipt was given by a firm which, as was found by the learned Judge who tried the cause, were curers and packers of pork, and not warehousemen within the meaning of the Ontario Mercantile Law Act. In this case I think *William Snarr* may be properly held to be a warehouseman, independently of his premises having been used for the storage of iron and stone, within the meaning of 34 Vict. All that is necessary under section 46 is that the receipt should be given by the keeper of a place wherein cereal grains or other articles enumerated may be stored or deposited; or that the receipt should be given for cereal grains, &c., stored or deposited. Where the receipt is given by the owner of the cereals &c., for cereals &c., stored or deposited in his own warehouse or other place under section 48, he must be a person engaged in the

(a) 44 U. C. R. 187.

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calling of keeper of a cove, wharf, &c. The language is different in the two sections, but assuming that the person giving the receipt must, under section 46 as well as section 48, be a person engaged in the calling of a warehouseman, &c., I think the provision of the Act is satisfied in this case; and would be so by *William* being warehouseman for the storage of the coal of the firm of which he was a member; but he does not appear to have so limited the business of the premises of which he was lessee, for he appears to have been a wharfinger as well as a warehouseman, and certainly in the former capacity exercising a "calling" within the meaning of section 48.

1881.

Smith
v.
Merchants'
Bank.

Another objection is, that the warehouse receipt is for coal *received from the bank*, the Act of 1859, 22 Vict. ch. 20, authorizing only the advance of money by the bank upon the security of a receipt given by a warehouseman, and by *indorsement* thereon, by the owner or person entitled to receive the cereal or other thing deposited, transferred to the bank, and it was held in the *Royal Canadian Bank v. Miller (a)*, in appeal, that the statute must be strictly pursued, and that a receipt direct to a bank was not authorized by the Act.

Judgment.

By the later Act, 34 Vict., the Act of 1859 is repealed, and it is not required by the later Act that warehouse receipts should reach the bank by indorsement only; as was interpreted to be the meaning of the former Act. The later Act, however, is since Confederation, and it is contended that the provision in question is an interference with the functions of the Local Legislature of Ontario, to which is committed by the British North America Act the duty of legislating in relation to "Property and Civil Rights in the Province." On the other hand, among the powers of the Parliament are: "The regulation of trade and commerce," and "banking,

(a) 29 U. C. R. 266.

1881.

Smith
v.
Merchants'
Bank.

and incorporation of banks and the issue of paper money;" and legislation upon all matters not assigned exclusively to the Legislatures of the Provinces.

Legislation upon trade and commerce and upon banking must necessarily affect to some extent property and civil rights. Legislation upon property and civil rights in the abstract is committed to the Provincial Legislatures; but where they are affected only by the legislation of the Dominion Parliament upon subjects upon which the Parliament has express authority to legislate it cannot be an invasion of the functions of the Provincial Legislature for the Parliament so to legislate. To hold otherwise would be to nullify the powers of Parliament, not only in its legislation upon the two subjects to which I have expressly referred, but upon many other subjects which are made expressly subjects of its jurisdiction; not certainly less than one-half of the twenty-nine subjects in which exclusive legislative authority is given to the Dominion Parliament. I agree with what was said by *Wilson, C. J.*, (then a Judge of the Court of Queen's Bench,) upon this point in *Crombie v. Jackson (a)*.

Judgment.

A further question arises from the fact of the insolvents having mixed the coal for which the warehouse receipts in question were given to the bank, with other coal in the warehouse in which they were deposited. They had a quantity of coal of their own before this coal was received, and a quantity of other coal was received later in the year. The warehouse receipts stated—in two of them that the coal was in sheds, in other two that it was in bins, facing the esplanade, and "is separate from, and will be kept separate and distinguishable from other coal." The evidence proves that this was not done, and that no attempt was made to do it; that the only distinction

(a) 34 U. C. R. 579.

attempted was of the different kinds of coal; and further it is in the evidence that the quantity of coal in store at the time of the insolvency was less than the quantity comprised in the warehouse receipts unaccounted for by the insolvents to the bank. There has been, therefore, a wrongful admixture by the insolvents.

1881.

Smith
v.
Merchants'
Bank.

If it were now a case between the bank and the *Snarrs*, I do not see what answer the *Snarrs* could make to a demand by the bank to account for the whole of the coal in store. If they were to set up that a portion of the coal now in store was coal not comprised in the warehouse receipts and that the bank therefore had no claim upon that portion, the answer would be, as was in substance the answer given to the like objection in *Gilmour v. Buck* (a), that the difficulty of distinguishing the one from the other was occasioned by the wrongful act of the *Snarrs*, and that they are not in a position to complain of it. The assignee can be in no better position upon this question than the *Snarrs* themselves. Judgment.

Lupton v. White (b), is the leading case upon this point. In it Lord *Eldon* refers to previous cases decided upon the same principle. And the same principle has been acted upon in several cases in our own Courts. I have already referred to *Gilmour v. Buck*. There are also *Coffey v. The Quebec Bank* (c), *Lawrie v. Rathbun*, (d), and *Great Western R. W. Co. v. Hodgson* (e). The leading American case I believe is *Hart v. Ten Eyck* (f), which was decided by Chancellor *Kent*. No case could well be more clearly within the principle than the case before me.

Upon the whole my opinion is, that the plaintiff's case fails, and that the defendants are entitled by way

(a) 24 C. P. 186.

(c) 20 C. P. 120.

(e) 44 U. C. R. 197.

(b) 15 Ves. 436.

(d) 38 U. C. R. 255.

(f) 2 Johns. Ch. 108.

1881. *Smith v. Merchants' Bank.* of cross-relief, for which they pray, to an order for the payment out to them of the money in Court, and to a declaration that they are entitled to any coal of the descriptions specified in the warehouse receipts that may be in the warehouse, or on the premises referred to in the warehouse receipts; and to an order for delivery of the same; and if the plaintiff has sold any of the coal to which the defendants were entitled, he must account for the proceeds.

The decree must be with costs.

IN RE TAYLOR.

RE LOT ONE, MISSISSAGA STREET, ORILLIA.

Quieting Titles Act—Infancy—Statute of Limitations—Title by possession.

Where a person enters upon the lands of infants, not being a father or guardian, or standing in any fiduciary relation to the owner, and remains in possession for the statutable period, the rights of the infants will be barred. *Quinton v. Frith*, Ir. R. 2, Eq. 415, considered and not followed.

Re Taylor, 8 P. R. 207, reversed on rehearing.

This was a petition filed in January, 1879, under the Quieting Titles Act, for the purpose of quieting the title of the petitioner *Beverley Sharp Taylor* to a lot of land in the town of Orillia. It appeared that *James Douglas Taylor*, the father of the petitioner, had taken possession of the property in the spring of 1856, and so remained in possession until his death in 1872, and since that time the petitioner and his co-heirs had continued to occupy the lot; all parties having actual knowledge of the claim of the contestants, the widow and infant children of one *Wanzer*.

On the matter coming before the Referee of Titles, 1881.
Mr. Holmested, that officer allowed the claim of the
 petitioner, holding the right of the contestants barred
 under the statute. From this decision the contestants
 appealed, and the appeal came on for argument before
Blake, V. C., who feeling himself bound by the decision
 in *Quinton v. Frith (a)*, reversed the order of the
 Referee, and dismissed the petition, with costs, as
 reported in 8 P. R. 207, where the circumstances con-
 nected with the title are clearly set forth.

Re Taylor.

The petitioner thereupon set the matter down for rehearing before the full Court.

Mr. Boyd, Q. C., and *Mr. McGregor*, for the petitioner.

Mr. Arnoldi, contra.

PROUDFOOT, V. C.—The single question presented for decision in this matter is, whether a stranger who takes possession of an infant's lands, with knowledge of the infant's title, can claim the benefit of the Statute of Limitations, so as to enable him to retain possession against the owner, who has attained his majority. Judgment.

The stranger, *Taylor*, went into possession in 1856, and died in 1872. The petitioner claims under him, and has been in possession since 1872. The petition was filed in January, 1879. The petitioner and his ancestor have consequently been long enough in possession to enable the petitioner to claim the benefit of the statute unless his knowledge of the title of the infants precludes him from doing so: R. S. O. ch. 108, secs. 3, 44.

The books are full of cases establishing that where any person, whether a father or a stranger, enters upon the estate of an infant, and continues in possession,

(a) Ir. R. 2 Eq. 415.

1881. this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined, and declare the infant entitled to have a decree for the possession of the property: *Littleton*, sec. 124; *Morgan v. Morgan* (a), *Dormer v. Fortescue* (b), *Howard v. Earl of Shrewsbury* (c). Nor do I think that *Hagley v. West* (d) was intended to lay down any different rule. There the bill was filed thirty years after the title accrued, and stated a legal title, without shewing that the disability of infancy had continued till such a period as to justify the interference of this Court, and the Court held that the infant must assert his legal right before he could claim an account of rents.

But the question has to be decided upon the provisions of our Statute of Limitations: R. S. O. ch. 108.

As between trustee and *cestui que trust*, in the case of a direct trust, no length of time is a bar, for, from the privity existing between them, the possession of the one is the possession of the other: *Lewin* on Trusts, 7th ed., p. 733. A purchaser for value from a trustee, even with notice of the trust, is not an express trustee, and he can obtain the benefit of the statute (sec. 30) by holding for the prescribed time after the conveyance to him.

Constructive trustees are not prevented from claiming the benefit of the statute: *Beckford v. Wade* (e), *Hovenden v. Lord Annesley* (f); and (by sec. 29) no suit can be brought in equity to recover the land but within the same period as an action at law might have been brought upon a legal title. Strangers who enter upon an infant's estate are only constructive trustees: *Lockey v. Lockey* (g), *Hovenden v. Lord Annesley* (h),

(a) 1 Atk. 489.

(c) L. R. 17 Eq. 378.

(e) 17 Ves. 87.

(g) Prec. Ch. 518.

(b) 3 Atk. 130.

(d) 3 L. J. Ch. (O. S.) 63.

(f) 2 Sch. & Lef. 617.

(h) 2 Sch. & Lef. 617.

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Darby and Bosanquet 183, *Browne* 293. They may be treated as bailiffs, and compelled to account and to give up possession, but if allowed to remain in possession for the statutory period, they may resist either claim. The liability to account is limited to six years by the statute of James, (our R. S. O. ch. 61, sec. 2,) which renders infancy an absolute disability, and if the action be brought within six years after attaining majority, the account runs back to the beginning of the title; but if not brought within these six years the statute may be pleaded as a bar: *Lockey v. Lockey* (a), *Hovenden v. Lord Annesley* (b).

1881.
Re Taylor.

By our statute (ch. 108, sec. 44,) no action is to be brought after twenty years, though the claimant may be under disability for the whole time; so that an infant may be barred before he has attained his majority; and the anomaly is presented of a plaintiff having, through disability, a longer time within which he may sue for an account than for the possession of the estate.

Judgment.

Howard v. Earl of Shrewsbury (c), was much relied on by the contestants, but it does not seem to me to have much bearing on this subject. It was not a question upon the Statute of Limitations. Lord Romilly had decided, in *Crowther v. Crowther* (d), that if an infant never was in possession or in the enjoyment of the property, either by himself or his guardian, he stands in the same position as any other person, and must first establish his legal title. In *Howard v. Earl of Shrewsbury*, (e) Sir George Jessel, M.R., dissented from this opinion of Lord Romilly, and held, following the cases that had been cited for the contrary view, that an infant is entitled to treat a stranger who takes possession of his estate as his

(a) Prec. Chy. 518.

(b) 2 Sch. & Lef. 617.

(c) L. R. 17 Eq. 378.

(d) 23 Beav. 305.

(e) L. R. 17 Eq. 378.

1881. bailiff or agent to get an account of rents and profits, and a decree for possession. But we have seen above that this liability to account for the rents is barrable by the Statute of James, and for the same reason his liability to have the possession taken from him would seem barrable by the R. S. O. ch. 108. If the contestants were permitted, by reason of infancy, to resist this proceeding after twenty years from the accruer of their title, or right of entry, it would render section 44 nugatory.

Re Taylor.

There would seem to be, therefore, good grounds for the suggestions of Sir *W. Page Wood*, V.C., in *Thomas v. Thomas* (a), where he says: "I do not accede to the argument, that because an infant can treat any stranger who has entered upon his land as his bailiff, for the purpose of enforcing an account of the rents and profits received by such stranger, it therefore follows that the infant may in all cases treat such stranger as a bailiff, for the purpose of escaping from the effect of the Statute of Limitations. I think that is open to considerable argument, especially as the statute provides that ten years only shall be allowed after the termination of the disability of infancy for the person who has attained majority to assert his rights, a provision which, it has been justly observed, must be rendered altogether nugatory, if it be held that in every case where a stranger enters upon an infant's estate he enters as bailiff, because if that were so time would not begin to run against the infant until he attained twenty-one." It was not necessary to decide the point, as the person there who had entered into possession was the father of the infant, and in the case of a relative a fiduciary relation was considered to be established that excluded the operation of the statute.

Judgment.

The decision now being re-heard was rested princi-

(a) 2 K. & J. 79.

pally on the case of *Quinton v. Frith* (a), in which the Vice Chancellor held that a stranger entering upon an infant's lands with the knowledge of his title is fixed with a fiduciary position as to the infant, and could not claim the benefit of the Statute of Limitations. 1881.
Re Taylor.

This case seems to me at variance with those I have referred to, which establish that a person entering upon an infant's lands is only a constructive trustee, or affected with a *quasi* fiduciary character only, which, though it may give a right to bring an action of account for the rents and profits, is not exempt from the operation of the Statute of Limitations. Lord Mansfield observed in *Lockey v. Lockey* (b), that "this receipt of the profits of an infant's estate is not such a trust, as being the creature of a Court of equity the statute shall be no bar to." And this was cited with approval by Lord Redesdale in *Hovenden v. Lord Annesley* (c).

And as to the corpus of the estate, it is clear that the stranger in possession is not an express trustee, but a trustee of a trust elicited by the principles of a Court of equity from the acts of parties. Such trusts are not saved from the operation of the statute. Thus, if a devisee for life of a leasehold estate renew in his own name, the statute will begin to run from the time of the renewal: *Petre v. Petre* (d). Judgment.

There is no confidence reposed in a stranger taking an unauthorized possession. There is no such fiduciary character as to create an express trust. Where an agent does not occupy a fiduciary position he may rely on the Statute: *Burdick v. Garritt* (e).

(a) Ir. R. 2 Eq. 396.

(c) Sch. 2. & Lef. 633.

(e) L. R. 5 Chy. 233.

(b) Prec. Ch. 518.

(d) 1 Drew. 371.

1881. **BLAKE, V. C.**—Sitting as a Court of re-hearing we are not bound by the case of *Quinton v Frith* (a), and the point raised by the appellant is therefore open for consideration, as to my mind it was not in the Court below. The question seems to turn on whether the petitioner occupied such a position towards the infant contestants as that it can be said the land "is vested in a trustee upon an express trust," or not, (R. S. O. ch. 108, sec. 30). Lord *Redesdale* in *Hovenden v. Lord Annesley* (b), thus deals with the two exceptions out of the statute: "Now I take it that the position which has been laid down 'that trust and fraud are not within the statute,' is qualified just as he qualifies it here: that is, if a trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*, and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title. * * * But the question of fraud is of a very different description: that is a case where a person who is in possession by virtue of that fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a Court of Equity, founded on the fraud; and his possession, in the meantime, is adverse to the title of the person who impeaches the transaction on the ground of fraud."

Judgment.

Vice-Chancellor *Kindersley*, in *Petre v. Petre* (c), thus explains what an express trust under the Act is: "The 25th section is also confined to express trusts, that is trusts expressly declared by a deed, or will, or some other written instrument; it does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument; and the effect is, that a person who is under

(a) Ir. R. 2 Eq. 396.

(b) 2 Sc. & Lef. 632.

(c) 1 Drew. 371.

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some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in the enjoyment of the property, from setting up the statute. But, if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply; and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for lapse of time, would be the right owner." At p. 749, Mr. *Lewin* states the rule to the same effect: "But trusts arising by the construction of a Court of Equity from the acts of parties, or to be made out by circumstances, or to be proved by evidence, will not be saved by the clause relating to express trusts." See also *Shelford's Real Property Statutes*, p. 202 *et seq.*, *Banning's Limitation of Actions*, p. 135; *Perry on Trusts*, vol. 1, sec. 166.

1881.
Re Taylor.

Judgment.

In this case the petitioner would no doubt be considered as bailiff, or agent of the infants, having entered upon the property with the knowledge of their infancy, and as such would be bound to account for rents and profits, under ordinary circumstances; but I do not think that there is in this case an "express trust" within the statute, and therefore the statute has run against the contestants and barred their claim. I cannot find any authority for the proposition, satisfactory to the mind or binding on this Court, that a stranger, even with the knowledge of the infancy and of the title of the infants, occupies the position other than that of bailiff, agent, or constructive trustee; a relationship which generally gives the infants the right to an account, but which does not bring the person taking possession within that position which postpones the period for accrual of the right until a conveyance has been made to a purchaser. See *Angell's Limitation of Actions*, secs. 468, 474.

1881. I am of opinion that the petitioner is by virtue of the Statute of Limitations entitled to the certificate he asks, and that this order should be made, with the costs of the rehearing to the petitioner.

Re Taylor.

DIRECT CABLE CO. v. DOMINION TELEGRAPH CO.

Arbitration—Award—Practice—Cross bill—Umpire, appointment of.

When a submission to arbitration provides for making the submission a rule of any particular Court, no suit or proceeding can be had in any other Court to set aside the award, whether such submission has or has not been made a rule of the Court named in it.

Before an award has been made a rule of Court, a Court of equity has jurisdiction to restrain an arbitrator improperly appointed from entering upon the duties of such arbitration.

Where the defendants in a suit reside in this country, and the principal office of the plaintiffs is in England, and a contract is entered into there between the parties which is to be executed in New York, a suit in respect thereof may be instituted in this Province.

In a suit in this Court to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs, for irregularity in such nomination:

Held, that the arbitrators being necessary parties and the defendants resident in this country, the arbitrators, though resident out of the jurisdiction, were properly made defendants to the bill.

One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named, should appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party.

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A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, and on the 19th the plaintiff company, by cablegram from London, named one *C. M. D.*, of New York, as their arbitrator. On the 28th of the same month *S.*, the arbitrator of the defendant company, wrote to *C. M. D.* requiring him to join in the naming of an umpire, but he wrote saying he was about to leave the city, and would return on the 30th; that having been only advised by cable of his appointment and that his commission would be mailed to him, he could not until its arrival intelligently take any action. On the 30th *C. M. D.* returned to his office, and then wrote to *S.* expressing his readiness to act, and at the same time confirmed a nomination made by his partners, during his absence, of an umpire:

1881.

Direct
Cable Co.
v.
Dominion
Telegraph Co

Held, (1) that the facts did not establish any refusal or neglect on the part of *C. M. D.* to act as arbitrator, such as would justify *S.* in naming an arbitrator in his stead; (2) that the naming by the arbitrators of an umpire was a judicial act which could not legally be performed by the partners of one of the arbitrators, and his subsequent confirmation thereof was ineffectual.

The object of a cross bill ordinarily was to obtain discovery on the part of the plaintiff in the cross cause to be used in the original cause; or in order to obtain full relief in respect of the subject matter of litigation in the original cause. Therefore, where a bill was filed to restrain arbitrators, on the ground of irregularity in their appointment, from acting in respect of matters in dispute between the plaintiff and defendant companies, and the defendant company by their answer asked that if the Court entertained the case it should afford them relief in respect of the matters in dispute between the companies:

Held, that this was not the proper office of a cross-bill, and therefore could not be set up as a subject of cross-relief by the answer.

This was a suit by *The Direct United States Cable Co. (Limited)* against *The Dominion Telegraph Co. of Canada*, *George G. Sampson* and *Thomas T. Buckley*, the bill in which, filed 12th July, 1880, set forth that the plaintiffs were a body corporate and politic, duly incorporated under the laws of Great Britain, and having their chief office and place of business in the city of London, England; that the defendants, *The Dominion Telegraph Company*, were a body corporate and politic, incorporated under the laws of the Dominion of Canada, and that on or about the 25th of June, 1875,

1881. a business agreement was entered into by and between the then *Direct United States Cable Company (Limited)* and the said *Dominion Telegraph Company*, in writing, and executed by the said companies respectively, the thirteenth clause of which was as follows :

Direct
Cable Co.
v.
Dominion
Telegraph Co

"If any dispute or difference shall arise between the parties hereto, concerning any matter or thing contained or referred to in or arising out of this agreement, it shall be referred to arbitration, in the manner following, that is to say : Each of the parties in difference shall, upon request in writing, appoint an arbitrator in New York, and the two arbitrators appointed by or on behalf of the parties, respectively, and acting in the arbitration, shall within ten days after the appointment of such one of them as shall be last appointed appoint an umpire, who shall meet the arbitrators in New York, but if either of the parties in difference shall refuse or neglect to appoint an arbitrator for the space of ten days after being requested so to do by the other party, or shall appoint an arbitrator who shall refuse or neglect to act as such, then the arbitrator chosen by the party making such request shall appoint an arbitrator on behalf of the party who, or the arbitrator named by whom, shall refuse or neglect, as aforesaid, and the award of the said two arbitrators, or of their Umpire, as the case may be, shall be final and conclusive between the parties, and the submission hereby made shall be made a rule of Her Majesty's Court of Queen's Bench in England ; and the arbitrators and their Umpire shall have and exercise, as in Great Britain, all the powers and authority given to the arbitrators by the Common Law Procedure Act of 1854 ; and the submission hereby made and all proceedings thereunder or consequent thereon, shall be governed and controlled as in Great Britain, by all the provisions of the said Act which are applicable to submissions to arbitration and proceedings thereunder or consequent thereon ;"

Statement.

and on or about the 17th of March, 1876, another supplementary business agreement was duly executed between the said companies, but not varying such arbitration clause.

The bill further stated that subsequently, and in or about the year 1877, *The Direct United States Cable Company (Limited)*, one of the parties to the said two agreements, was regularly and voluntarily wound up and dissolved according to the laws of Great Britain, and the plaintiffs were duly incorporated under said laws, and succeeded by operation of law,

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and by special contracts, to the rights, agreements, business and assets of the aforesaid first *Direct United States Cable Company (Limited)*: that subsequently, and on or about the 1st of January, 1879, an agreement was executed by and between the plaintiffs and the defendants *The Dominion Telegraph Company of Canada*, in writing, reciting the aforesaid two agreements, the voluntary dissolution of *The Direct United States Cable Company (Limited)*, the party to the aforesaid two agreements, the incorporation of the plaintiffs, the transfer to the plaintiffs of the business, assets, and contracts of said dissolved company; and the provisions of the aforesaid agreements of 25th June, 1875, and of 17th March, 1876, were adopted, confirmed and re-enacted in the same way as if the plaintiffs and defendants, *The Dominion Telegraph Company of Canada*, had made direct contracts with one another, containing the provisions of the said indentures respectively, but subject to certain modifications not affecting the arbitration clause, relating to arbitration, that is to say:

1881.
Direct
Cable Co.
v.
Dominion
Telegraph Co.

Statement.

"5. Any question or difference between the companies, parties hereto, arising out of, or in reference to, any matter, act or thing under these presents, shall be decided by arbitration as, and in manner provided for, in the thirteenth clause of the said indenture of the 25th day June, 1875."

The bill further stated that by the provisions of the Common Law Procedure Act of England, 17-18 Vict. ch. 125 (1854), the arbitrators could appoint an umpire at any time within the period during which they had power to make an award; and that on or about the 3rd of June, 1880, the said *Dominion Telegraph Company of Canada*, claiming that a difference existed between it and the plaintiffs, which was a proper subject of arbitration under the provisions of the aforesaid agreements, did, by a notice in writing, nominate and appoint the defendant, *George G. Sampson*, of 58 Fine street, in the city of New York, in the United States of America, banker, as an arbitrator of the

1881. *said Dominion Telegraph Company* in the said matter, and by the said notice requested the plaintiffs within ten days from the service of the said notice upon them, to appoint an arbitrator in New York on their part: that the notice was served upon *George G. Ward*, an agent of the plaintiffs in the city of New York, the said plaintiffs not having any principal officer resident in the United States of America, on the 10th of June, 1880: that thereupon, and on the 19th of June, 1880, the plaintiffs in London, by cablegram from London to New York, appointed *Charles M. DaCosta*, advocate, of No. 29 Nassau street, in the city of New York, as the arbitrator of the plaintiffs, under the provisions of the said agreements, and notified the said *Dominion Telegraph Company*, and the said *George G. Sampson*, of the said appointment: that on the 24th of June, 1880, *Thomas Swinyard*, Vice-President of *The Dominion Telegraph Company*, addressed a letter in the following words to the said *Charles M. DaCosta*:

Statement.

"THE DOMINION TELEGRAPH COMPANY, GENERAL OFFICE,

18 FRONT STREET EAST, TORONTO, }
24th June, 1880. }

"DEAR SIR,—*The Direct United States Cable Company* having on the 19th instant, through their superintendent, *Mr. G. G. Ward*, notified me by cable that you had been appointed to act as arbitrator for them in the matters of dispute between our two companies, I, on the same day, telegraphed to *Mr. G. G. Ward*, suggesting that he should at once see to and arrange an early meeting with our arbitrator, *Mr. G. G. Sampson*, of 58 Pine street, New York, in order that you might immediately agree upon an umpire; and I also suggested to *Mr. Ward*, that the 1st and 2nd July next might be a convenient time for proceeding with the arbitration. If you have not yet met *Mr. Sampson*, will you kindly do so, in order to arrange these preliminaries and fix an early day for proceeding with the arbitration, as an immediate determination of the matters in question is of vital importance to my company.

"Yours faithfully,

"*THO. SWINYARD*,

"*Vice-President and Managing Director.*

"*Charles M. DaCosta*, Esq.,
29 Nassau Street, New York,"

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and the same was received by Mr. *DaCosta* on Saturday, the 26th of June, 1880 : that on Monday, the 28th day of June, 1880, Mr. *DaCosta* addressed the following letter to the said *Thomas Swinyard* :

1881.

Direct
Cable Co.
Dominion
Telegraph Co

"JUNE 28th, 1880.

"DEAR SIR,—I beg to acknowledge the receipt of your letter of the 24th instant.

"I have not yet received any formal appointment as arbitrator, nor do I know the terms under which the arbitration is to be held. I have only been advised by cablegram of my appointment, and that my commission has been mailed. Until its receipt I can take no steps because I am entirely ignorant of the points of arbitration or the powers of the arbitrators, which will, of course, depend upon the terms of the arbitration clause, if any, in the contract between the companies.

"I have just received a letter from Mr. *Sampson* asking me to have an interview with him.

"I am about leaving town to be absent a couple of days, and therefore am obliged to postpone such interview until the day after to-morrow.

Yours very truly,

"CHARLES M. DACOSTA.

"*Thomas Swinyard*, Esq.; Vice-President,

Dominion Telegraph Company,

18 Front Street East, Toronto."

Statement.

On the 28th of June, 1880, the said *DaCosta* received a letter from Mr. *Sampson*, in the following words :

"NEW YORK, June 28, 1880.

"Mr. Charles M. *DaCosta*, 29 Nassau Street, New York :

"DEAR SIR,—I have been advised by *Thomas Swinyard*, Vice-President of *The Dominion Telegraph Company*, that on the 19th of June *The Direct United States Cable Company* appointed you to act as their arbitrator in connection with myself as arbitrator for *The Dominion Telegraph Company* in certain matters of difference between those two companies. Will it be convenient for you to meet me to-day, and if so, at what time and place, in order that we may confer together ?

"Yours truly,

"GEORGE G. SAMPSON,

"58 Pine Street, New York."

On receipt of which Mr. *DaCosta* sent a verbal message to Mr. *Sampson*, stating, in substance, that in the course of a few hours he would have to leave the city, but that he would return on Wednesday, June 30th, and would then have an interview with Mr. *Sampson* ; and

1881. shortly afterwards confirmed the said message in writing, by addressing to Mr. *Sampson* the following letter :

Direct
Cable Co.
v.
Dominion
Telegraph Co

" JUNE 28, 1880.

" MY DEAR SIR,—I was very much occupied when your messenger came with your note of to-day, and I sent a verbal message in reply. I now beg to confirm what I then said, viz., that I intend to leave town in the course of a few hours, to be absent until the day after to-morrow, and that on that day, at any time between ten and two o'clock, I shall be pleased to see you.

" Yours very truly.

" CHARLES M. DaCOSTA.

" *George G Sampson, Esq., 58 Pine Street,*"

and just at the moment such letter was about to be despatched by Mr. *DaCosta*, the following letter from Mr. *Sampson* to him was received :

" NEW YORK, 28th June, 1880.

" *Charles M. DaCosta, Esq.*

" DEAR SIR,—In response to your verbal reply to my note, I beg to say it is important we should meet to-day, as the time allowed for appointment of umpire will expire to-morrow night. Please inform me at what time and place I can meet you to-day.

" Yours truly,

" GEORGE G. SAMPSON,

" 58 Pine Street."

Statement

Whereupon *DaCosta* added to his said note the following postscript and sent said letter and postscript to the said *Sampson* :

" P. S.—Since writing the above I have received your second letter. It is impossible for me to take any affirmative action in the matter at present, as I am totally ignorant of the terms of the arbitration clause as to the selection of an umpire, if any, or as to any other matter. I have only been advised by cable of the fact of my appointment, and that my commission would be mailed. Until it arrives you can readily see that I could not intelligently take any action.

C. M. DaC." ;

and shortly afterwards, and at about three o'clock in the afternoon of the said 28th of June, 1880, Mr. *DaCosta* left his office and was absent therefrom and from the city of New York, and was at Saratoga until the morning of the 30th of June, 1880.

The bill further stated that on the said 28th of June 1880, and after Mr. *DaCosta* had left the city of

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New York for Saratoga, Mr. *Sampson* sent the following letter addressed to him at his office :

"No. 58 PINE STREET, NEW YORK CITY,
June 28, 1880.

Direct
Cable Co.
v.
Dominion
Telegraph Co

"MY DEAR SIR,—Your reply to my communication of to-day has been received, in which you state that you will be absent from the city after a few hours until Wednesday, and that you are ignorant of the terms of the arbitration clause as to the selection of an umpire, if any, or as to any other matter, and that you have only been advised by cable of the fact of your appointment, and that your commission would be mailed. I beg to enclose herewith a copy of the arbitration clause in the contract of date 25th of June, 1875, under the terms of which the appointment of yourself as arbitrator to act for *The Direct Cable Company*, and of myself to act as arbitrator for *The Dominion Telegraph Company* has been made. *The Direct Cable Company*, No. 16 Broad street, will be able to furnish you with the whole contract.

"You will observe that as your appointment was made on the 19th June instant, the ten days allowed for the appointment of an umpire will be ended to-morrow, the 29th of June. If you fail to act in the matter, as required by the terms of the contract, the responsibility must rest with yourself and *The Direct Cable Company*, as I am prepared to meet you at any time and place you may name in order to agree with you upon an umpire. After the appointment of such umpire shall have been made we can, doubtless, then arrange for a meeting with him after the receipt by you of further information on the subject.

Yours truly,

"GEO. G. SAMPSON.

"To *Charles M. DaCosta*,

No. 29 Nassau Street, New York City ;"

and on the 29th of June, 1880, Mr. *Sampson* addressed the following letter to Mr. *DaCosta* :

"NEW YORK, June 28, 1880.

"Mr. *Charles M. DaCosta*, 29 Nassau Street, New York :

"DEAR SIR,—I am instructed by *The Dominion Telegraph Company*, in whose behalf I am acting as arbitrator, to inform you, acting as arbitrator for *The Direct United States Cable Company (Limited)*, in respect to certain matters of dispute or difference between the two companies above named, that if you shall refuse or neglect to act as such arbitrator by meeting with me and appointing an umpire within ten days after the date of your appointment, June 19th, 1880, I shall proceed in accordance with the provisions of the contract between the two companies to appoint an arbitrator in your stead. Personally, I very much regret the necessity for such notification to you, and I trust that you will detach all idea of discourtesy to you in any manner. *The Dominion Telegraph Company* desires this arbitration to

1881
 Direct
 Cable Co.
 v
 Dominion
 Telegraph Co

proposed in the promptest manner possible, and to avail themselves of all the provisions of the contract to effect this result, and only wish to take such steps as will serve to protect their status in the premises.

Yours truly,

"GEORGE G. SAMPSON,
 "58 Pine Street."

"P.S.—I will be here until four p.m.

"G. G. S.]"

which was received by the partners of Mr. *DaCosta* after he had left New York, and on the following day they addressed the following letter to Mr. *Sampson* :

"JUNE 29, 1880.

"DEAR SIR,—Your favour of yesterday, enclosing a copy of the arbitration clause in the agreement was not received until after Mr. *DaCosta* had left his office, as he informed you he would in his communication to you of yesterday morning. Under these circumstances it seemed impossible to do anything, as he could not be consulted or advised with.

"It has occurred to us, however, to prevent any failure of the provisions of the arbitration respecting the appointment of an umpire, that we should nominate an umpire on behalf of Mr. *DaCosta*, and we hereby nominate Mr. *Francis T. Garrettson*, of No. 26 Broad street, a gentleman well-known in this city. Should this nomination be acceptable to you, Mr. *Garrettson* will be the umpire; but if it is not, nothing could be done until Mr. *DaCosta's* return to-morrow.

Yours, very truly,

"BLATCHFORD, SEWARD, GRISWOLD & DACOSTA.

"*George G. Sampson*, Esq., 58 Pine Street,"

and thereupon Mr. *Sampson* addressed a letter to the said firm in the following words :

"NEW YORK, June 29, 1880.

"Messrs. *Blatchford, Seward, Griswold & DaCosta* :

"GENTLEMEN,—I am in receipt of your note of this date, for which I beg to thank you. The provisions of the contract between the two companies, under the terms of which I am acting in the arbitration matter, require the two arbitrators to appoint an umpire. I am, therefore, compelled to decline to act upon the suggestion you have made.

Yours truly,

"GEORGE G. SAMPSON,
 "58 Pine Street."

The bill further stated that early on the morning of the 30th June, 1880, *DaCosta* returned to the city and received the letters so addressed to him by Mr. *Sampson*, and which had been sent to his office during his

Statement.

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absence, and he immediately wrote a letter to Mr. 1881.
Sampson, ratifying and confirming the appointment of
Francis T. Garrettson, made on his behalf the pre-
 ceding day, as follows:

Direct
 Cable Co.
 v.
 Dominion
 Telegraph Co.

"JUNE 30, 1880.

"*George G. Sampson, Esq., 58 Pine Street :*

"DEAR SIR,—I have just returned to the city, and find various
 letters sent to my office after I had left it on the afternoon of June
 28th.

"I have read a copy of the letter which my firm addressed to you
 yesterday, nominating on my behalf Mr. *Francis T. Garrettson* as
 the umpire. I now confirm such nomination as my act.

"Yours, very truly,

"CHARLES M. DaCOSTA."

That afterwards Mr. *Sampson* addressed the follow-
 ing letter to Mr. *DaCosta* :

"NEW YORK CITY, June 30, 1880.

"*Charles M. DaCosta, Esq., 39 Nassau Street, New York :*

"DEAR SIR,—I am in receipt of your letter of this day stating that
 you confirm the letter of your firm sent me yesterday, purporting to
 nominate Mr. *Francis T. Garrettson* as an umpire.

"The contract under which I am acting is explicit in its provi-
 sions. The suggestion of a nomination by your firm was not within
 its terms, and I have already taken action in the matter by appoint-
 ing *Thomas T. Buckley, Esq.,* of No. 33 Nassau street, as arbitrator
 in your place, and I have notified *The Direct United States Cable*
Company and *The Dominion Telegraph Company* of such action.

"Yours truly,

"GEORGE G. SAMPSON, Arbitrator."

Whereupon Mr. *DaCosta* addressed the following
 letter to Mr. *Sampson* :

"JULY 1, 1880.

"*George G. Sampson, Esq., 58 Pine Street :*

"DEAR SIR,—Your letter of yesterday was received too late for me
 then to answer it. In view of its contents it now only remains for
 me to protest against the action which you inform me you have taken
 in the alleged appointment by you of *Thomas T. Buckley, Esq.,* as
 arbitrator in my place and stead.

"I did not refuse or neglect so to act as arbitrator, nor do I now
 refuse or neglect so to act. Your acts in the premises are, as I am
 advised by counsel, illegal and unauthorized. Any action by you
 and Mr. *Buckley* will be at your peril.

"Yours, very truly,

"CHARLES M. DaCOSTA.

"A copy of this has been sent to Mr. *Buckley,*"

1881. and at the same time Mr. *DaCosta* enclosed a copy of such letter to Mr. *Buckley*, with the following note:

Direct
Cable Co.

Y.
Dominion
Telegraph Co

"JULY 1, 1880.

"*Thomas T. Buckley, Esq., 33 Nassau Street:*

"DEAR SIR,—I beg to enclose for your information a copy of a letter which I have this day sent to Mr. *George Sampson*.

"Yours, very truly,

"CHARLES M. *DaCosta*."

The bill further stated that the said *George G. Sampson* falsely claiming and pretending that, by reason of the facts and letters above set forth, the said *Charles M. DaCosta* had neglected or refused to act as arbitrator for *The Direct United States Cable Company (Limited)*, proceeded to go through the form and make the pretence of substituting the defendant *Thomas T. Buckley* in the place of the said *Charles M. DaCosta*, as arbitrator for the plaintiffs; and that, late in the afternoon of the 30th June, 1880, the said *George G. Sampson* caused the following letter to be sent to *The Direct United States Cable Company (Limited)*, which was received by an agent of said company, at its office, 16 Broad street, New York city:

Statement.

"58 PINE STREET, NEW YORK CITY, }
June 30, 1880. }

"*The Direct United States Cable Company (Limited)*, No. 16 Broad Street, New York City:

"*The Dominion Telegraph Company, Toronto, Ontario:*

"GENTLEMEN,—Whereas, *Charles M. DaCosta, Esq.*, who was appointed by *The Direct United States Cable Company (Limited)*, on the 19th day of June, 1880, as arbitrator on their behalf, has refused to act as such arbitrator within ten days after the date of his appointment, as provided by the contract between the two companies, I hereby give you notice that, in accordance with the provisions of the contract under which I am acting, I have this day appointed *Thomas T. Buckley, Esq.*, Vice-President of the National Bank of the Republic, of this city, as arbitrator on behalf of *The Direct United States Cable Company (Limited)*, in place of the said *Charles M. DaCosta, Esq.*

"Yours truly,

"GEORGE G. SAMPSON, Arbitrator."

The bill further stated that the plaintiffs insisted that such pretended appointment of said *Buckley* in

place of Mr. *DaCosta* was wholly unauthorized, illegal, and void, and that the said *DaCosta* never neglected or refused to act, but, on the contrary, at all times was ready and willing to act as the arbitrator of the plaintiffs, and therefore directed their agent, *George G. Ward*, who had received the letter from Mr. *Sampson* last above mentioned, to address the following letter to Mr. *Sampson*:

1881.

Direct
Cable Co.
V.
Dominion
Telegraph Co

"THE DIRECT UNITED STATES CABLE CO. (LIMITED),
16 Broad Street, New York, July 1st, 1880. }

"To *George G. Sampson, Esq., 58 Pine Street, City*:

"DEAR SIR,—Your favour of the 30th June, addressed to *The Direct U. S. Cable Co. (Limited)* and *The Dominion Telegraph Company*, to the effect that you had appointed *Thomas T. Buckley, Esq.*, as arbitrator on behalf of *The Direct U. S. Cable Co. (Limited)*, in consequence of the refusal or neglect, as you allege, of *Charles M. DaCosta, Esq.*, to act as arbitrator on behalf of the said *Direct U. S. Cable Co.*, was received late yesterday afternoon. Mr. *DaCosta* has not neglected or refused to act as such arbitrator, and has at all times, and now is, ready to act, and will meet you for the purpose of electing an umpire, and for all the purposes contemplated by the agreement between the two companies. I protest against your conduct as unwarranted by the said agreement, and, as I am advised by counsel, unauthorized by law, and you will be held responsible for all acts of yours to the prejudice of *The Direct U. S. Cable Co. (Limited)*.

Statement.

"I am, dear sir, yours truly,

"*GEORGE G. WARD, Superintendent,*"

and on the same day Mr. *Ward*, by direction of the plaintiffs addressed the following letter to Mr. *Buckley*:

"THE DIRECT UNITED STATES CABLE COMPANY (LIMITED),
16 Broad Street, New York, 1st July, 1880. }

"*Thomas T. Buckley, Esq., Vice-President of the National Bank of the Republic, City*:

"DEAR SIR,—Late yesterday afternoon a letter was received by me at this office over the signature of *George G. Sampson*, arbitrator, and addressed to *The Direct U. S. Cable Co. (Limited)* and *The Dominion Telegraph Company*, Toronto, Ontario, to the effect that said *Sampson* had, on that day, appointed you as arbitrator on behalf of *The Direct U. S. Cable Co. (Limited)*, in place of *Charles M. DaCosta, Esq.*, who is alleged in said letter to have refused or neglected to act as arbitrator for the said *Direct U. S. Cable Co.*

"Mr. *DaCosta* has never neglected or refused to act as arbitrator for the said *Direct U. S. Cable Co.*, but has been at all times, and now is, acting as such for them. The pretended appoint-

1881.
 Direct
 Cable Co.
 v.
 Dominion
 Telegraph Co.

ment of yourself as arbitrator for said company, by Mr. Sampson, is wholly unwarranted by the contract between the aforesaid two companies, and, as I am advised by counsel, is utterly illegal. The said *Direct U. S. Cable Co.* has protested and now protests against these illegal acts of Mr. Sampson, and repudiates them; and I regret to have to notify you that should you assume to act as pretended arbitrator for *The Direct U. S. Cable Co. (Limited)*, you will be held personally responsible for all acts which may result to the prejudice of the said company.

"I am, dear sir, yours truly,

"GEORGE G. WARD, *Superintendent.*"

The bill further stated that, notwithstanding such protests, the said *Thomas T. Buckley*, falsely pretending to act as the arbitrator of the plaintiffs, in conjunction with the aforesaid *George G. Sampson*, as arbitrator for *The Dominion Telegraph Company*, sent the following letter to Mr. *George G. Ward*:

"NEW YORK CITY, July 1, 1880.

"*The Direct United States Cable Company (Limited)*, No. 16 Broad Street, New York City:

"*The Dominion Telegraph Company*, Toronto, Ontario:

Statement. "GENTLEMEN,—Under the authority conferred upon us by the agreements between your companies, under which we are acting as arbitrators, we yesterday appointed Hon. *Enoch L. Fancher*, of this city, as umpire, to act with us in the consideration and settlement of the questions in dispute or difference, which have arisen between the two companies. As soon as we are notified of his acceptance we shall inform you of the fact, and of the time and place of our meetings.

Yours very truly,

"THOMAS T. BUCKLEY,

"*Arbitrator for the Direct United States Cable Company (Limited).*"

"GEORGE G. SAMPSON,

"*Arbitrator for the Dominion Telegraph Company.*"

and that immediately upon the receipt thereof the plaintiffs, by their said agent, *George G. Ward*, addressed a letter to Mr. *Fancher*, protesting against his acting as an umpire, in the following words:

"THE DIRECT UNITED STATES CABLE COMPANY (LIMITED),
 16 Broad Street, New York, July 1, 1880. }

"Hon. E. L. Fancher, 229 Broadway, City:

"DEAR SIR,—I have this day received a notice addressed to *The Direct United States Cable Company (Limited)*, and *The Dominion Telegraph Company*, Toronto, Ont., and signed by *Thomas T. Buckley*, pretending to act as arbitrator of *The Direct United States Cable*

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Company (Limited), and *Geo. G. Sampson*, as arbitrator for *The Dominion Telegraph Company*, informing me that they have appointed you as umpire to act with them in the settlement of questions of difference between the two companies. I write immediately, on receipt of this letter, to inform you that *Charles M. Da Costa, Esq.*, is the arbitrator for *The Direct United States Cable Company (Limited)*; that *Mr. Buckley* is an interloper and a stranger to this matter; that *The Direct United States Cable Company (Limited)* has repudiated *Mr. Sampson's* act in appointing him, and denied his authority to do so, and that I am advised by the eminent counsel of *The Direct United States Cable Company* in London, as well as by its counsel here, that the action of *Mr. Sampson* in appointing *Mr. Buckley*, and all their subsequent joint acts, including your appointment, are illegal. Under these circumstances, and without any feeling except of the greatest respect for your high character and dignity, it is my duty to protest against your accepting the position of umpire in this matter.

"I am, dear sir, yours faithfully,

"*GEORGE G. WARD, Superintendent.*"

The bill further alleged that the plaintiffs were not aware whether the said *Hon. Enoch L. Fancher* had accepted, or would accept, the pretended appointment so tendered to him; and that, on the 2nd of July, 1880, the plaintiffs addressed the following letter to *Mr. Sampson*, arbitrator for *The Dominion Telegraph Company*, and to *Thomas T. Buckley*, repudiating their action, and holding them personally responsible therefor:

Statement.

"2nd July, 1880.

"*George G. Sampson, Esq., Arbitrator for the Dominion Telegraph Company:*

"*Thomas T. Buckley, Esq.:*

"GENTLEMEN,—I received yesterday afternoon a note from you to the effect that, under the authority conferred upon you by the agreements between *The United States Direct Cable Company (Limited)*, and *The Dominion Telegraph Company*, you had on June 30th appointed the *Hon. Enoch L. Fancher* as umpire to act with you in the consideration of differences between the said companies. You will please take notice that *The Direct United States Cable Company (Limited)* repudiates and ignores *Thomas T. Buckley*, who signed said note pretending to be arbitrator for said company, and considers him an interloper and a stranger to the matters in hand; that it denies the authority of you, or either of you, to appoint an umpire, as you pretend to have done, and refuses to recognize *Hon. Enoch L. Fancher* as such; that I am advised by counsel that your doings in this matter are illegal, and that all of your acts are at your own peril.

I am, gentlemen, yours truly,

"*GEORGE G. WARD, Superintendent.*"

1881.

Direct
Cable Co.
v.
Dominion
Telegraph Co

1881.

Direct
Cable Co.
v.
Dominion
Telegraph Co

Statement.

The bill further set forth that by reason of the aforesaid acts of the defendants the plaintiffs were exposed to great and irreparable injury, from the fact that under the pretended authority derived from the before-mentioned agreements, the said *Buckley* and *Sampson*, together with an umpire to be appointed by them, if not already appointed, were about to proceed to arbitrate supposed questions of difference involving difficult questions of law, and possibly large amounts of money between the plaintiffs and the defendants, *The Dominion Telegraph Company*, without any authority or warrant in law for the same, and against the protest of the plaintiffs; and that by the terms of the said agreements, and by the Common Law Procedure Act of 1854 before mentioned, any award that might be made by arbitrators might become a rule of Her Majesty's Court of Queen's Bench in England, and might be enforced against the property of the plaintiffs; that any award obtained under the proceedings therein set forth would be regular upon its face, although in fact illegal, and the result of grossly improper and illegal conduct upon the part of the pretended arbitrator, *Buckley*, and of the pretended assumption of authority on the part of the said *Sampson*, and to the very great damage of the plaintiffs; that the plaintiffs had been and would be put to great expense, annoyance, and inconvenience, costs of counsel and otherwise, in consequence of the unlawful acts of *Sampson* and *Buckley*, under the direction of *The Dominion Telegraph Company*, and to the extent of at least \$5,000; and that the plaintiffs had begun an action in the Supreme Court of the State of New York, and had obtained an interim injunction restraining the proceedings of the defendants, but the defendants, *The Dominion Telegraph Company*, being domiciled in this province, and acting through their officers and servants therein, it was necessary to obtain the aid of this Court in order to obtain full and effectual relief in the premises.

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The prayer of the bill was (1) that the defendants might be restrained from prosecuting the said pretended arbitration, or from taking any further steps therein; (2) that the pretended appointment of the defendant, *Thomas T. Buckley*, by the defendants, *The Dominion Telegraph Company*, of Canada, as the arbitrator of the plaintiffs, might be declared to be illegal, null, and void, and be vacated and set aside, and the said *Charles M. Da Costa* declared to be the duly appointed arbitrator of the plaintiffs; (3) that the defendants might be ordered to pay to the plaintiffs the loss, costs, and damages incurred in and by the premises and their costs of this suit; and for further and other relief.

1881.
Direct
Cable Co.
v.
Dominion
Telegraph Co.

The defendants severally answered the bill, insisting on the regularity of their acts; but it is not considered necessary to set the statements out at length, as the foregoing statement and the facts mentioned in the judgment are deemed sufficient.

The cause came on for the examination of witnesses and hearing in January, 1881.

Statement.

Mr. C. Robinson, Q.C., Mr. McCarthy, Q.C., Mr. J. F. Smith, and Mr. Rae, for the plaintiffs.

Mr. H. Cameron, Q.C., for the defendants *Sampson and Buckley*.

Mr. Crooks, Q. C., and Mr. Bethune, Q. C., for the defendant company.

Witt v. Corcoran (a), Baker v. Stephens (b), Lord v. Lord (c), Ringland v. Loundes (d), Cross v. DeValle (e), Mayer v. Harding (f), Ranelagh v. Melton (g), Law v. Garrett (h), Wakefield v. The Llanelly Railway, &c., Co. (i), Willesford v. Watson (j), Bradley v. London

(a) L. R. 3 Ch. 476n.

(c) 5 El. & Bl. 404.

(e) 1 Wallace 5.

(g) 2 Dr. & Sm. 278.

(i) 34 Beav. 245.

(b) L. R. 2 Q. B. 523.

(d) 15 C. B. N. S. 173.

(f) L. R. 2 Q. B. 410.

(h) L. R. 8 Ch. Div. 26.

(j) L. R. 14 Eq. 572.

1881. *and North-Western R. W. Co. (a), Grant v. Eddy (b), Lord Portarlington v. Soulby (c), Kidd on Awards, 92; Adams on Equity, 769; Mitford, 98; Story's Eq. Pl. secs. 389-391; Morse on Arbitrations, 244; Daniel Ch. Pr. 1403; Russell on Awards, 549, were cited.*

Direct
Cable Co.
v.
Dominion
Telegraph Co

The points relied on by counsel appear in the judgment.

BLAKE, V. C.—It appears to me that it was possible for the parties to have ousted the jurisdiction of this Court in the present matter, but I am unable to conclude that this has been done up to the present. It seems clear that where the parties have agreed that the submission may be made a rule of Court, there, although it may not up to the time of filing the bill have been made a rule of the Court specified in the submission, yet a suit may not be entertained in this Court to set aside the award. The Act, C. L. P. A. (Imp.) 1854, Sec. 17, appears to restrict the power of the Court where the submission has been made a rule of the Court prescribed: “and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.” In this latter case not only is the power withdrawn from the other Courts to entertain a motion to set aside the award, but motions respecting the arbitration are to be made in that Court, which has thus drawn to itself peculiar jurisdiction in respect of the matters in difference between the parties and the mode of conducting the proceedings before the tribunal selected.

Halfhide v. Fenning (d) is a case that cannot now be sustained. See the case of *Auriol v. Smith, (e)* citing

(a) 5 Ex. 769.

(c) 3 My. & K. 104.

(e) 1 T. & R. 121.

(b) 21 Gr. 45, 568.

(d) 2 Br. C. C. 336.

the cases of *Ward v. Periam* (a), *Alexander v. Campbell* (b) and *Reynell v. Luscombe* (c). In *Nichols v. Roe*, (d) reversing the decision of the Vice Chancellor, the Lord Chancellor held that the Court of Chancery had no jurisdiction to relieve against the award where the submission had been made a rule of the Court of King's Bench subsequent to the filing of the bill. It is not necessary to refer to the cases of *Davis v. Getty* (e), *Dawson v. Sadler*, (f), *Gwinett v. Bannister* (g), *Nichols v. Chalie* (h) as they are mentioned in *Nichols v. Roe*. In *Heming v. Swinnerton* (i) the Lord Chancellor, in allowing a demurrer which the Vice Chancellor had overruled, says: "A third point was that, supposing the case to be within the statute, there was no reason why the jurisdiction to set aside the award should not be exercised in this form by bill: but it appears to me that the jurisdiction by bill is excluded by the statute; for it was evidently intended, if it is not done in express terms, to exclude any jurisdiction to interfere with the enforcement of an award, but that which is specially provided by the statute." In *Cooke v. Cooke* (j) the then Vice Chancellor says: "We find, then, a long series of decisions anterior to *Dimsdale v. Robertson* which determined this—that an agreement to refer does not oust the ordinary jurisdiction of the Court. * * If any one thing be better established than another, it is this—that the jurisdiction of one of the higher Courts, if it exists, cannot be ousted except by express enactment. * * * As long since as the Act of *William III.*, the Legislature has declared that 'when the award has been made' the jurisdiction of every tribunal shall be ousted, except that of the Court before which the award is pending in the shape of a rule of Court. *

1881.

Direct
Cable Co.
7.
Dominion
Telegraph Co

Judgment.

(a) 7 Eq. Cas. Ab. 91.

(c) 1 T. & R. 135n.

(e) 1 Sim. & St. 411.

(g) 14 Ves. 530.

(i) 2 Ph. 79.

(b) 41 L. J. Ch. 473.

(d) 3 Myl. & Keen 431.

(f) 1 Sim. & St. 537.

(h) 14 Ves. 265.

(j) L. R. 4 Eq. 77.

1881.
 Direct
 Cable Co.
 v.
 Dominion
 Telegraph Co

* * But then the authorities say that an agreement to refer to a *forum domesticum* is not such an agreement as ought to oust the jurisdiction of the superior Court, at least not in a case where there is not, as there was in *Dimsdale v. Robertson*, an express covenant not to sue. * * * * When the bill was filed, in December 1866, there was indisputably jurisdiction in this Court, because, as was truly alleged, the agreement to submit was made as long before as in February 1865, nearly two years previously, and nothing had been done under that agreement. * * * I prefer resting the case on the broad ground, that it is no bar to a suit of this kind to plead that there is a reference pending, which may or may not ultimately result in an award being made." See *Harding v. Wickham*, (a).

Judgment.

Mr. Russell states (pp. 53-4), "Though the Courts of Equity yielded reluctantly to the force of the Act of Parliament, it is now settled, that when the submission is agreed to be made a rule of another Court, whatever equitable ground there may be for impeaching the award, the jurisdiction of equity to set it aside is entirely taken away, and transferred to the Court or which the submission is made a rule."

I think that in a proper case this Court has power to and should interfere to restrain an arbitrator acting. See *Maunsell v. Midland R. W.* (b), *Willesford v. Watson* (c), citing *Witt v. Corcoran* (d), *Kerr* on Injunctions, 533; *Russell* on Awards p. 201; *Beddow v. Beddow* (e), and *Malmesbury Railway Company v. Budd* (f), in which latter case Sir George Jessel says: "I should not therefore assume jurisdiction at all. It would be simply carrying out the well known jurisdiction formerly exercised by the Courts of Equity, but

(a) 2 J. & H. 676.

(c) L. R. 8 Ch. 473.

(e) L. R. 9 Ch. Div. 89.

(b) 1 H. & M. 130.

(d) L. R. 8 Ch. 476n.

(f) L. R. 2 Ch. Div. 113.

which is now transferred to the High Court, to restrain that from being done, which if done, could do no good to any body, but would cause an immense amount of mischief in the shape of delay, expense and trouble." It is true that in the present case the plaintiffs could protect themselves by protest in attending before the arbitrators. That is clearly laid down by Lord Selborne in *Hamlyn v. Betteley* (a). "Even in arbitrations, where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made." That case differs from *Ringland v. Loundes* (b) where there was made but a qualified protest, the persons objecting appearing before the arbitrators, and stating that if the award were against them they would apply to set aside the proceedings as unauthorized. There the objection was an unsubstantial one, touching the question whether or not there was a proper enlargement of the time for making the award.

1881.

Direct
Cable Co.
v.
Dominion
Telegraph Co.

It seems clear from these authorities that the general rule holds good in this as in other cases (1) that the Court retains jurisdiction unless it be expressly taken from it. (2) That when the submission is to be made a rule of a particular Court, no other Court will interfere when the award is made, either to enforce it or to set it aside, even before the submission be made a rule of Court. (3) That until the submission be made a rule of the Court designated, another Court has jurisdiction under certain circumstances to regulate the course of proceeding which may be taken in the matter of the arbitration.

That being so, if there be no other well founded objection to the case made by the plaintiffs I think the present a suit in which the plaintiffs are entitled in their behalf to the interference of this Court.

But it was argued, apart from the question of juris-

(a) L. R. 6 Q. B. Div. p. 63.

(b) 15 C. B. N. S. 173.

1881.
 Direct
 Cable Co.
 v.
 Dominion
 Telegraph Co.

diction just disposed of, that the plaintiffs have no right to demand relief in their favour of this Court, as the head office of the plaintiffs is in Great Britain, and the defendants *Sampson* and *Buckley* reside in the United States of America, and the contract was made in England.

The defendant company's head offices are within the jurisdiction of this Court, that is, within the "territorial jurisdiction" or the "topographical limits." (*Story's Conflict of Laws*, sec. 539). They cannot therefore object to a suit being brought against them in the Courts of this country, and as in bringing such suit the co-defendants *Sampson* and *Buckley* are properly parties the plaintiffs have power to add them.

Judgment.

It is unnecessary to go further into this matter, as the cases cited and the arguments adduced have been fully considered in this Court on rehearing in *Grant v. Eddy*, (a), and *Exchange Bank v. Springer* (b). It would not be possible for the defendant company to raise successfully the question of jurisdiction when, as in paragraphs 23 and 36 of their answer they do not deny jurisdiction, but claim that the Court should in this litigation interfere in their favour.

The plaintiff company, within the time specified, appointed an arbitrator, who within ten days accepted the office: *Ringland v. Loundes* (c). The nomination of the umpire submitted by Mr. *DaCosta* to Mr. *Sampson* could not satisfy the requirements of the submission.

The appointment of an umpire is a judicial act to be done by both arbitrators: it is an exercise of their joint judgment: *Lord v. Lord* (d). In this attempted appointment by Mr. *DaCosta* there was not a compliance with the requirements of the submission. On the

(a) 21 Gr. 45 and 568.

(c) 15 C. B. N. S. 173.

(b) Not yet reported.

(d) 5 EL. & BL. 404.

10th June the defendant company served a notice on the plaintiffs requiring them to appoint an arbitrator; on the 19th by cable, Mr. *DaCosta* was appointed; he accepted the office and was recognised by the defendant company as the plaintiffs' arbitrator. From the 19th to the 28th there was no communication between the arbitrators, on which latter date Mr. *Sampson* asked for an interview, and being informed that Mr. *DaCosta* was leaving the city until the 30th, Mr. *Sampson* informed him that the time for appointing the umpire expired on the 29th. Mr. *DaCosta* left New York at 3.30, on the afternoon of the 28th, and was in his office at 10 A. M. of the 30th. In the meantime his partners acting for him had named Mr. *Garrettson* as umpire, which was ratified by Mr. *DaCosta* immediately on his return. The defendant company however proceeded through their arbitrator to appoint an arbitrator for the plaintiffs, and these two arbitrators, Messrs. *Sampson* and *Buckley*, proceeded and appointed an umpire, and contend they are justified with this tribunal in proceeding with the reference. It may be questioned whether *DaCosta* was an arbitrator "acting in the arbitration:" *Russell* on Awards, p. 224. *Mayer v. Harding* (a), *Baker v. Stephens* (b). However that may be the question is whether *DaCosta* is an arbitrator who refused or neglected to act as such, because the alleged right in favour of the defendant company only arose in case the plaintiffs did not, within the space of ten days after request appoint, or appointed "an arbitrator who shall refuse or neglect to act as such." It was not unreasonable that Mr. *DaCosta* should desire a copy of the submission, and to acquaint himself with the particulars of the matters in dispute, nor was it unreasonable that, having previously so arranged, he should absent himself for the short time he did, no application having been made to him until almost the last moment to

1881.

Direct
Cable Co.
V.
Dominion
Telegraph Co

Judgment.

(a) L. R. 2 Q. B. 410.

(b) L. R. 2 Q. B. 523. 527.

1881. name an umpire. He certainly did not refuse to act.

Direct
Cable Co.
v.
Dominion
Telegraph Co.

The word to "neglect" is explained in *Worcester's* Dictionary "to omit by carelessness or design; not to do, perform, improve, promote, or attend to as one ought, to leave out." What took place in regard to Mr. *Garrettsen* shews that Mr. *Da Costa* was not refusing or neglecting.

Judgment.

He desired to take part in the appointment of an umpire, and I cannot find that what has transpired can be considered as shewing that the plaintiffs appointed an arbitrator who refused or neglected to act as such. On the contrary, I find a readiness and willingness on his part so to act, and therefore that the condition has not arisen on which the defendant company would have been justified in proceeding to displace the plaintiffs' arbitrator and name one in his stead. If the defendant company were really desirous of proceeding regularly in the reference they might have waived the non appointment of the umpire within the ten days, and reappointed an arbitrator at such a date as would have brought the appointment of the umpire within the ten days: *Russell* on Awards 193, *Morse*, 244. I think, therefore, the plaintiffs are entitled to the declaration of this Court that the pretended appointment of the defendant *Buckley* is illegal, and that *Charles M. Da Costa* is the duly appointed arbitrator of the plaintiffs; and to restrain the defendant company from prosecuting the reference before the arbitrators as constituted by them.

It is contended by the defendant company that if the Court entertains the case it should give to them the cross-relief for which they ask, which involves the matters in dispute between the companies which are the subject of the reference in question. By their answer these defendants have prayed for this relief. Under General Order 126, a defendant is allowed to claim by answer any relief against the plaintiff which

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such defendant might claim by cross-bill. The bill simply asks that the defendants may be restrained from proceeding with the pretended arbitration because of the illegal appointment of an arbitrator. The defendant company ask that the matters referred to the arbitrators may be withdrawn from them and be disposed of by the Court. A cross-bill was ordinarily filed (1) in order to the obtaining of discovery on the part of the plaintiff in the cross-cause to be used in the original cause, or (2), in order to obtain full relief in respect of the subject matter of the litigation in the original cause. What is asked for here by the defendants does not come within either of these two classes of cases. The subject matter of the grievance brought forward by the plaintiffs is the illegal constitution of the Court, which is the tribunal to try the questions between the parties. Everything necessary to the giving of full relief in respect of this matter is before me. What the defendants ask does not arise out of the questions raised here. They rather leave the question, and start one entirely independent, namely, "whether the arbitration be rightly constituted or not, I ask the Court to withdraw the matters in dispute from that tribunal and settle them in this forum." These defendants may be entitled to file a bill claiming what is asked by this answer, but as an answer taking the place of a cross-bill it cannot be sustained; it in no way forms a defence to the claim of the plaintiffs, nor does it present ground for relief in respect of the simple matter presented by the plaintiffs. See *Cunningham v. Buchanan* (a), *Mitford on Pleading*, 95; *Kemp v. Mockrell* (b); 2 *Mad. Ch. Prac.* 564. Mr. *Welford* says, pp. 223, 228, "A cross-bill should not introduce new and distinct matters, not embraced in the original suit, and they cannot be properly examined at the hearing of the first suit." See also 2 *Dan.* 1402,

1881.

Direct
Cable Co.
v.
Dominion
Telegraph Co

Judgment.

(a) 10 Gr. 513

(b) 3 Atk. 811.

1881. "A cross-bill is a bill brought by a defendant against the plaintiff in another suit (and, if necessary, other parties) touching the same matter."—*Story's Eq. Pl.*
Direct
Cable Co.
v.
Dominion
Telegraph Co. sec. 389, *et seq.*

Judgment. I think the plaintiffs are entitled to the declaration asked, with costs, against the defendant company, and that this company must also pay the costs of the co-defendants, *Sampson* and *Buckley*.

INDEX
TO THE
PRINCIPAL MATTERS.

ACKNOWLEDGMENT OF TITLE.

See "Statute of Limitations," 5.

ADMINISTRATION SUIT.

See "Demurrer," 2.

ADVANCES MADE *BONA FIDE* TO CARRY ON
BUSINESS.

See "Insolvency," 5.

AGREEMENT TO ADVANCE MONEY.

See "Sale under Power."

ALIMONY.

See "Marriage," 5.

ALLEGED TORTIOUS ACTS OF CROWN.

See "Petition of Right," 2, 3.

ALLOWANCE OF ITEMS PAID WITHOUT
AUTHORITY.

See "Receiver," 1.

ALTERING DOCUMENT.

A mortgagee executed a statutory discharge which was incorrectly dated, and his agent in good faith and in order to make the instrument conform to the intention of the mortgagee altered the date, which alteration was, under the circumstances, immaterial, and, as altered, the document stated correctly what was intended by the parties to it. Under these circumstances a bill impeaching the validity of such discharge was dismissed, with costs.

Sayles v. Brown, 10.

See also "Fraudulent Conveyance," 9.

AMERICAN CHARTER.

See "Bridge Company," 1, 6.

ANCIENT DOCUMENT.

See "Fraudulent Conveyance," 6.

APPEAL FROM MASTER.

On a question of rent, there was a conflict of evidence as to the amount thereof. On appeal from the Master's finding:

Held, that the witnesses having been examined before the Master, he was a better judge than the Court as to the weight to be given to the testimony of the respective witnesses; and the question as to the proper sum to be allowed for rent, was one with which the Master was quite as competent to deal, as the Court could be.

Little v. Brunker, 191.

APPOINTMENT OF INTERESTED TRUSTEE.

See "Assent to Sale by Tenant for Life," 2.

ARBITRATION.

1. In answer to a bill to enforce an award, the defendant by answer submitted to the Court a number of matters as objections to the award, and that a reference back to the arbitrator, with certain instructions, or a reference to the Master as to the matters in dispute should be directed. At the hearing on bill and answer, the defendant objected, (1) to the jurisdiction of the Court, the submission providing that the submission and award should be made a rule of the Queen's Bench or Common Pleas; (2) that the filing of the bill was premature, the time for moving against the award not having expired:

Held, that a proceeding to enforce an award by summary application, must be taken after the time for moving against it has elapsed ; and

Quere, whether a proceeding for that purpose by action at law or suit in equity, can be taken before that time.

Held, also, that the objection to the jurisdiction would have prevailed if properly taken as the parties to the submission had agreed upon their forum ; but the defendant having submitted to the jurisdiction by his answer, and himself asked the intervention of the Court, could not now be heard to object.

Moore v. Buckner, 606.

2. It not appearing that there was any good reason for filing a bill instead of proceeding in the usual way, the Court [SPRAGGE, C.,] refused to the plaintiff any costs other than such as he would have been entitled to had he proceeded to enforce the award under the statute.

Id.

3. When a submission to arbitration provides for making the submission a rule of any particular Court, no suit or proceeding can be had in any other Court to set aside the award, whether such submission has or has not been made a rule of the Court named in it.

Direct Cable Co. v. Dominion Telegraph Co., 648.

4. Before a submission has been made a rule of Court, a Court of equity has jurisdiction to restrain an arbitrator improperly appointed from entering upon the duties of such arbitration.

Id.

[Since argued in Appeal.]

See also "Cross-bill."
"Umpire," &c.

ASSENT TO SALE BY TENANT FOR LIFE.

1. Land was settled on a trustee, in trust for the use of *H.* till marriage, and then upon other trusts for the husband and wife as tenants for life, and ultimately providing for the issue ; the assent of the tenant for life was necessary for a sale ; and there was power in the deed to appoint *H.* as a trustee on the original trustee refusing, &c., to act. The trustee had an absolute discretion as to forfeiting and applying the estate among or for the benefit of the parties to the deed in case of anticipation or attempted anticipation.

Held, that the consent of *H.* and his wife, as tenants for life, satisfied the condition as to the assent in case of a sale : that *H.*, as trustee, was entitled to receive the purchase money, and that the purchaser was not bound to see to its application.

In re Treleven and Horner, 624.

2. But it having been suggested by the Court that the appointment of *H.* as trustee, was not one which the Court would have made, the matter again came on for argument, when it was

Held, that *H.* was placed in a position in which his interest as one of the parties to the deed upon forfeiture might conflict with his duty as trustee, and that the Court would not have made and could not sanction his appointment. *Id.*

ASSESSMENT ON PREMIUM NOTES.

See "Mutual Insurance Company," 2.

ASSIGNING BOOK DEBTS.

See "Fraudulent Preference," 2.

ASSIGNMENT OF MORTGAGE SUBJECT TO EQUITIES.

See "Mortgage, &c.," 2.

ASSIGNMENT TO AND BY EXECUTRIX OF DECEASED PARTNER.

See "Partnership," 1.

ATTORNEY-GENERAL.

See "Parties," 1.

AWARD,

[TIME FOR ENFORCING.]

See "Arbitration," 1, 3.

"Umpire," &c.

BILLS OF LADING.

See "Warehouse Receipts," 1, 2.

BONA FIDE ADVANCE TO CARRY ON BUSINESS.

"See Insolvency," 4.

BONA FIDES.

See "Altering Document."

BRIDGE COMPANY.

1. Under the legislation of the State of New York, which gave a special power to impose tolls, and of Canada incorporating the original International Bridge Company, and permitting them to consolidate, the amalgamated company had power to levy tolls; and in Canada they were unrestricted in their powers of levying.

The International Bridge Company v. The Canada Southern Railway Co., and The Canada Southern Railway Co. v. The International Bridge Company, 114.

2. *Held*, also, that as between a claim for tolls already earned and a rate to be fixed for the future, it was properly within legislative authority to limit future tolls, but it was a judicial function to determine a reasonable sum, considering all the circumstances, to be paid for tolls already earned.

Ib.

3. *Held*, also, that such charters are in the nature of contracts between the public and the undertakers of the scheme, and the latter should not be restricted in their right to compensate themselves after having embarked private capital in them.

Ib.

4. *Seemle*, that in the absence of express authority in the Canadian Act to impose tolls there is an implied power to do so as incident to their undertaking.

Ib.

5. The directors of the Bridge Company had framed a schedule of tolls, with knowledge of which the defendants used the bridge, kept an account as to the amount charged them by the plaintiffs, and compounded with the plaintiffs for arrears on the same basis:

Held, sufficient to charge them as upon an agreement to pay the schedule tolls; and that the defendants could not set up that the tolls were unreasonable.

Ib.

6. The Act of Congress passed after the amalgamation declaring the bridge a lawful structure and a post road of the United States of America, and that the District Court of New York should settle the terms and conditions upon which lines of railway should use the bridge, could not and did not take away the right to impose tolls at discretion expressly given to the American company by the New York charter; and it could not and was not intended to affect Canadian subjects or the Canadian corporation. The Parliament of Canada could not constitutionally, and did not enact that Canadian subjects and the Canadian corporation should be subject to the legislation of Congress: hence the amalgamated company by virtue of their Canadian Charter had unrestricted power to impose tolls and recover them in Canadian Courts; or at any rate the Canadian company could do this for their half of the bridge, making such arrangements as should be necessary with the American company as to the other half.

Ib.

7. It would be unconstitutional for the Parliament of Canada to pass an Act, rendering Canadian subjects and Canadian corporations subject to such laws as might be passed by the Congress of the United States; in fact an abdication of sovereignty inconsistent with the relations of Canada to the Empire of which it forms a part. *Id.*

[Affirmed on Appeal, 24th March, 1882.]

See also "Injunction," 1.

BUILDING, COVENANT AGAINST.

See "Injunction," 5.

CARE TAKER.

See "Statute of Limitations," 3.

CANADIAN CHARTER.

See "Bridge Company," 6.

CERTAINTY OF ALLEGATION.

See "Pleading," 3.

CHOSE IN ACTION.

See "Will," &c., 4.

CHOSE IN ACTION OF WIFE.

See "Fraudulent Conveyance," 4.

"Husband and Wife," 1.

COMMISSIONERS OF GOVERNMENT WORKS.

See "Trustee," &c., 1, 2, 3, 4.

COMPENSATION.

See "Specific Performance," 2.

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COMPENSATION TO TRUSTEES.

See "Trustee," &c., 2, 3.

COMPLICATED DECREE.

See "Mortgage," &c., 3.

COMPUTATION OF TIME.

See "Injunction," 2.

CONFLICT OF INTEREST WITH DUTY.

See "Trustee," &c., 4.

CONFLICTING EVIDENCE.

See "Appeal from Master."

CONSTRUCTION OF STATUTES.

See "Statutes," &c.

CONSTRUCTIVE TRUSTEE.

See "Statute of Limitations," 6.

CONTRADICTORY STATEMENTS.

See "Fraudulent Conveyance," 10.

CONVERSION OF REALTY.

See "Will," &c., 4.

CONVEYANCE IN FEE.

1. The grantor conveyed certain lands to the grantee, his heirs and assigns, and by a proviso at the concluding part of the deed declared "nevertheless, that the above *L.* shall have no right to sell, alien, or dispose in any way whatsoever of the above-mentioned premises, but have

only the use during his life-time, after which his children will have full right to the said property above mentioned."

Held, on demurrer, that such proviso was repugnant to the grant and *habendum* in fee, and therefore void.

Lario v. Walker, 216.

2. The bill stated that the plaintiff was grandson of *L.*, who had died intestate.

Held, that this did not sufficiently state the title of the plaintiff. *Id.*

CORRECTING DEED BY GRANTEE.

[AFTER EXECUTION.]

See "Fraudulent Conveyance," 9.

CORROBORATIVE EVIDENCE.

See "Promise to Leave Money by Will."
"Wife's Chose in Action."

COSTS.

See "Arbitration," 2.
"Executors," 1.
"Injunction," 1.
"Marriage," 5.
"Mortgage," &c., 3.
"Patent of Invention," 4.
"Petition of Right," 4.
"Principal and Agent," 2.
"Receiver."
"Redemption."
"Statute of Limitations."
"Voluntary Deed."
"Will, Construction of," 2.
"Will, Invalidity of,"

COSTS OF SALE.

See "Principal and Agent," 3.

CO-SURETIES, LIABILITY OF, TO CONTRIBUTE.

See "Loan and Savings Society."

COVENANT AGAINST BUILDING.

See "Injunction," 5.

CROSS BILL.

The object of a cross bill ordinarily was to obtain discovery on the part of the plaintiff in the cross cause to be used in the original cause; or in order to obtain full relief in respect of the subject matter of litigation in the original cause. Therefore, where a bill was filed to restrain arbitrators, on the ground of irregularity in their appointment, from acting in respect of matters in dispute between the plaintiff and defendant companies, and the defendant company by their answer asked that if the Court entertained the case it should afford them relief in respect of the matters in dispute between the companies:

Held, that this was not the proper office of a cross bill, and therefore could not be set up as a subject of cross relief by the answer.

The Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co., 648.

DEBENTURES FOR MONEY BORROWED.

See "Mutual Insurance Company."

DECEASED PARTNER.

See "Partnership," 1.

DEFENDING ONE SUIT AND ALLOWING JUDGMENT TO GO BY DEFAULT IN ANOTHER.

See "Fraudulent Preference," 1.

DELAY IN PROCEEDING.

See "Mechanics' Lien Act," 1.

DEMURRER.

1. In a bill the style of cause named several females as being severally wives of their respective husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs.

Webster et al. v. Leys et al., 471.

2. The bill shewed that the testator had appointed four executors, three of whom died, but stated that those so dying had never received any portion of the assets. In a suit for the administration of the estate, a demurrer *ore tenus* on the ground that the representatives of such deceased executors should be parties, was also overruled with costs. *Ib.*

See also "Conveyance in Fee."

"Equitable Garnishment."

"Injunction," 5.

"Pleading," 1, 2.

"Railway Company," 3.

"Sale under Power.

"Will," &c., 4, 5.

DESCRIPTION OF LAND CONVEYED.

A description of land in a deed by reference to other conveyances for a fuller description is sufficient.

In re 'Treleven and Horner, 624.

See also "Injunction," 5.

DIRECTORS, ELECTION OF.

See "Joint Stock Company."

DISMISSAL OF FORMER BILL.

See "Statute of Limitations," 2.

DISCOVERY.

See "Practice," 1.

DISPUTED SIGNATURES.

See "Mortgage," &c., 1.

DOWER.

The testator bequeathed to his widow for life an annuity of \$60, payable by his son J., his heirs, &c., together with all and singular his household furniture, &c., and in the event of his widow remaining in the dwelling-house on the premises after his decease, she was to have the free use of

certain rooms therein; and in case of sickness while there this son was to see that she had proper medical attendance and nursing. This annuity as well as the other bequests the testator charged upon the lands in question, and devised the same so burthened to his said son, the defendant.

The widow filed her bill for payment of the annuity alone, not claiming any lien on the land in respect of the charges created in her favour by the will or for dower. The usual decree for payment or in default sale was made, with reference to the Master at Hamilton, under which the land was sold, without any reference to dower or the other charges, and the purchase money was paid into Court. In the Master's office the widow made no claim, either for dower or in respect of the other charges; but she afterwards presented a petition to have it declared that she was entitled to dower in the land and to compensation in respect of the bequests above set out, and prayed that a sum in gross out of the money in Court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation for the other benefits.

Held, following *Murphy v. Murphy*, ante volume xxv., page 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in Court; but that by her acquiescing in the sale of the land, and by her laches, she had waived her right to any compensation for the loss of the benefits bequeathed to her.

Ripley v. Ripley, 610.

ELECTION.

See "Dower."

ELECTION OF DIRECTORS.

See "Joint Stock Company."

ENFORCING SALE.

See "Vendors and Purchasers' Act."

ENTRIES IN BOOKS.

See "Loan and Savings Society."

ERRONEOUS DECREE.

The Court will not assist in carrying on or perpetrating error, by enforcing an erroneous decree.

Mitchell v. Strathy, 80.

ESTOPPEL.

See "Fraudulent Conveyance," 10.

EQUITABLE GARNISHMENT

The plaintiffs, who had recovered judgment against the defendant *W.*, filed a bill alleging that *W.*, being the owner of lands subject to a mortgage, conspired with his co-defendant whereby a second mortgage was executed by *W.* to one *A.*, who paid the money to the co-defendant, which was held by him as agent or trustee for *W.* The lands were subsequently sold in a suit by the first mortgagee, and realized sufficient to pay the two mortgages only. The plaintiffs proved their claim in that suit in the Master's office, but received nothing. They alleged that they had been led to believe that the mortgage by *W.* to *A.* was *bona fide*, but had ascertained that such was not the fact; and prayed that the co-defendants might be ordered to pay over the amount paid out of the proceeds of the land to satisfy the mortgage in favour of *A.*

Held, that the bill was in effect one to garnish the money due to *W.* in the hands of his co-defendant, and under the authority of *Horsley v. Cox*, L. R. 4 Ch. 92, and *St. Michael's College v. Merrick*, 1 App. R. 520. S. C. 26 Gr. 216, could not be maintained.

Gilchrist v. Wiley, 425.

[But see further as to this, *Leaming v. Woon*, decided in Appeal, 24th March, 1882.]

EQUITABLE REMAINDER.

See "Statute of Limitations," 1.

EVIDENCE.

See "Fraudulent Conveyance," 6.

"Loan and Savings Society.

"Statute of Limitations," 2.

EXECUTED CONSIDERATION.

See "Promise to leave Money by Will."

"Statute of Frauds."

EXECUTION CREDITORS.

1. An execution creditor does not occupy as favourable a position under the Registry Act as a purchaser for value without notice; and he may be defeated by a deed made before though registered after the lodging of the execution in the hands of the sheriff.

Russell v. Russell, 419.

2. The common law right as to the priority of an execution creditor of a lunatic, who has an execution in the hands of the sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realizing under his writ.

In re Alexander Grant, a Lunatic, 457.

EXECUTORS.

Where an executor by his misconduct in the management of an estate, causes a suit, and but for the fact of the suit having been brought the assets would have been dissipated, the Court will not, as a general rule, allow such executor his costs out of the estate, although no loss has been sustained; and where in such a case, the party interested filed a bill without calling upon the executor for an account, or affording him any opportunity of shewing that his dealings were correct, the Court, [SPRAGGE, C.,] refused the costs of the suit to either party, but directed the executors to pay the subsequent costs up to the hearing.

Simpson v. Horne, 1.

See also "Principal and Agent."

EXIGIBLE PROPERTY.

See "Fraudulent Preference," 2.

FALSA DEMONSTRATIO.

See "Will," &c., 6.

FALSE STATEMENTS AS TO STATE OF PROPERTY.

See "Specific Performance," 2.

FARM CROSSINGS.

See "Railway Company," 2.

FIRE INSURANCE.

By the statute incorporating an Insurance Company, which was authorized to carry on business on the mutual as well as the proprietary principle, it was enacted that "no mutual insurance shall be effected on * * nor on any kinds of mills, carpenters', or other shops, which by reason of the

trade or business followed are rendered extra hazardous: machinery, breweries, distilleries, tanneries, or other property involved in similar or equal hazard." The company, professing to act under their charter, granted a policy of insurance on a grist, carding and fulling mill, which were all in one building, and the position therein of the picker, it was alleged, rendered the risk extra hazardous. The structure was destroyed by fire. In a suit instituted to compel payment of the insurance, the company raised the defence of *ultra vires*, which the Court [SPRAGGE, C.,] sustained, and dismissed the bill; but refused the company their costs of suit, as in opposing the plaintiff's claim they were resisting upon inequitable grounds the payment of a just debt.

Lowson v. Canada Farmers' Ins. Co., 525.

[Reversed on Appeal, 28th November, 1881.]

FORECLOSURE.

A writ was in the hands of the sheriff at the suit of the plaintiffs against *I.*, at the time of the dismissal of a bill filed by *I.* to redeem the plaintiffs, and at the time of the sale to *M.*, which dismissal had the effect of a decree of foreclosure against *I.*

Held, notwithstanding, that the plaintiffs might proceed to recover their debt against *I.*, they being in a position to reconvey the mortgage premises.

Bank of Toronto v. Irwin, 397.

"FORTHWITH," MEANING OF, IN STATUTE, (43 VICT. CH. 58 SEC. 3. (D.))

The word "forthwith" in sec. 3 of the 43rd Vict. ch. 58 (D), means after the meeting of the provisional directors, and not forthwith after the passing of the Act.

McLaren v. Fiskien, 352.

FRAUDULENT CONCEALMENT.

See "Insolvency," 3, 4.

FRAUDULENT CONVEYANCE.

1. A bill was filed in 1880 alleging that in June, 1864, the defendant *L.* conveyed to the defendant *R.* a lot of land, which conveyance was either voluntary or the consideration received therefor had been repaid, and that *L.* had ever since occupied the lands, without any acknowledgment of title in *R.* up to January, 1880, when *L.* attorned to *R.*, placing his

(*L.*'s) son in possession. On the hearing it was satisfactorily established that *R.* was a mortgagee of the property, and that in 1864 the equity of redemption had been released in consideration of further advances to *L.*, who then left the country, and did not return until 1867, when he went into possession, and expended large sums of money in improvements, made after consultation with *R.*, and which were so made in lieu of rent. The Court [PROUDFOOT, V. C.,] was of opinion that the suit entirely failed so far as it rested on the fraudulent character of the original transaction between *L.* and *R.*, and that *L.* had not acquired a title by length of possession, but if he had he was not bound to assert it so as to enable an execution, sued out at the instance of the plaintiffs, to attach upon the property.

Workman v. Robb, 243.

2. In a suit by a creditor impeaching a sale by *N.* to his sister, made in consideration of her assuming two mortgages on the land, certain executions against him which she paid, and of a debt due to herself, it appeared she was aware of the plaintiff's claim; that her brother had no other property to meet it; that he was of improvident habits; that a sheriff's sale was pending; that *N.* had previously refused a larger sum for the land than his sister gave; that *N.* continued after the sale to reside on the land; that she shortly afterwards sold the estate for more than twice what she gave for it, and that she bought other lands with part of the proceeds, upon which lands *N.* went and resided:

Held, that sufficient was shewn to warrant a decree declaring the conveyance by *N.* to his sister fraudulent as against creditors under the statute of Elizabeth.

Merritt v. Niles, 346.

3. *S.* purchased lands with moneys payable to him by the Crown for work done under a contract, which lands he procured to be conveyed to his wife.

Held, that although the moneys could not be reached by garnishing them before being paid by the Crown, yet that the money having passed out of the Crown, by reason of the husband's appointment in favour of his wife, the effect was to defraud creditors, and the gift was therefore void under the statute of Elizabeth.

Nicholson v. Shannon—McPherson v. Shannon, 378.

4. The defendant *F.* was married in 1849 without any settlement. He was appointed and acted as executor of the estate of his wife's father, and, acting on behalf of his wife, he received large sums from the estate which it was alleged he borrowed from her:—£7,600 before 1759, and £2,800 in 1879; all such moneys being charged to the wife in the books of the estate. The conveyances impeached in this suit were of lands which, with other property, had been purchased by the husband with the moneys so received on account of his wife, the deeds for which, however, had been taken in the name of *F.* The mother of his wife had frequently requested *F.* to settle these properties on the wife, and which he did not object to

do, and in 1873, when he with his wife was about to visit Europe, *F.* did convey the property in question to the wife. In 1872 and 1873 *F.*, jointly with one *C.*, entered into extensive speculations and made a considerable amount of money. In 1873 *F.* indorsed *C.*'s note for \$10,000, which *C.* discounted, and the same remained unpaid, and *F.* in 1874 gave his cheque to the plaintiff for \$4,000 on which this suit was instituted.

Held, (1) that as to the £7,600, *F.* having acted for his wife in obtaining this money from her father's estate, and having never made any claim thereto in exercise of his marital right, having borrowed it only, as established by the testimony of the wife's mother, there was no reduction into possession by the husband of the money. (2) And as to the £2,800 the *onus* was upon the plaintiff to establish a gift to the husband by the wife, which he failed to do; on the contrary, the evidence shewed it to have been a loan.

Vinden v. Fraser, 502.

5. When *F.* incurred the liability for *C.*, he was in affluent circumstances, and continued to be so for a year after the conveyance impeached in this suit; after which period the liability to the plaintiff was incurred:

Held, that the plaintiff was not, in respect of his own claim, in a position to impeach the conveyance, and could not be in a better position than the prior creditors, who clearly could not have avoided the transaction, the settlement having been made when the settlor in a pecuniary point of view was well able to make it. *Ib.*

6. *D.*, the purchaser of land, gave a mortgage thereon to secure part of the purchase money, and subsequently allowed taxes to accumulate on the land, which was sold in order to realize such taxes, when *D.* bought it and obtained the usual deed to himself. *D.* having made default in payment of the mortgage, proceedings at law were instituted thereon, pending which *D.* conveyed this and other property to his two sons, who gave a mortgage back securing the support and maintenance of *D.* and his wife, and the plaintiff, after recovering judgment, filed a bill impeaching the transaction for fraud.

Held, (1) that upon the evidence the transaction was fraudulent and void as against creditors; (2) that although ordinarily the production of the exemplification of a judgment at law is admissible, and has been generally received as evidence of a debt due the plaintiff against all parties in suits under the Statute of Elizabeth, yet that the judgment so recovered by the plaintiff against *D.* was not evidence against the sons, being *res inter alios judicata*; but (3) that the production of the original mortgage signed by *D.*, which was more than twenty years old, proved itself under R. S. O. ch. 109, sec. 1, sub-sec. 1, which makes such a document evidence of the truth of the recitals contained therein until shewn to be untrue; and therefore it was evidence of the debt due thereunder, and could be used as such against the sons.

Allan v. McTavish, 539.

[Since argued in Appeal.]

7. The defendant *B.*, who was carrying on a thriving business, and possessed of personal property to the value of about \$1,000, his debts not exceeding half that sum, in 1876 bought some land which he had conveyed to his wife, who had been instrumental in increasing the earnings of her husband. It was shown that all debts due by *B.* at the time of the settlement had been paid before the institution of this suit by the plaintiff, whose debt had accrued after this conveyance.

Held, under the circumstances, that the plaintiff was not in a position to impeach the conveyance, as it had not been made with a view of placing the property beyond the reach of future creditors.

Collard v. Bennett, 536.

8. In 1877, *B.*, being in difficulties, could not obtain credit. In 1878 the debt to the plaintiff was contracted, and in the same year *B.* made additions to the house on the land, which he paid for.

Held, that in respect of the moneys so expended, the case came within the principle of *Jackson v. Bowman*, ante vol. xiv., page 156. *Ib.*

9. *E.* obtained from his debtor an absolute conveyance of land as security, which was attacked by the plaintiff, who had subsequently recovered an execution against the grantor, as being a fraudulent preference. It was shewn that the deed, after its execution, had been altered by the grantee so as to convey the correct lot (22 instead of 122), the only lot owned by the grantor; but no re-execution or acknowledgment took place; the grantor, however, accepted a lease from *H.* of the correct lot, which he afterwards surrendered to *H.*

Held, that as the grantor, according to the ruling in *Sayles v. Brown*, ante page 10, could not claim to have the conveyance vacated, so neither could his creditor, the plaintiff.

Sommerville v. Rae, 618.

10. *H.* insisted that the conveyance to him was *bonâ fide*, while the grantor alleged it had been obtained by the fraud of *H.*, the Court [*BLAKE, V. C.*,] in view of the fact that the grantor in another suit had sworn that it was made for a valuable consideration and in good faith, refused the relief asked; the other circumstances in the case being such as not to justify a decree on the grantor's present statements, although not estopped by the first statement, but that he was at liberty now to present the facts otherwise. In such a case the explanations given for the different account of the transaction must be convincing. *Ib.*

11. Under these circumstances, and *H.* claiming to hold the land only as security for the amount due him, and the Court being satisfied of the *bona fides* of the transaction, ordered an account to be taken of the amount due *H.*, and the land to be sold; the proceeds to be applied first in payment of the amount due to *H.* for principal, interest, and costs, and the balance as in ordinary fraudulent conveyance cases; and for these purposes the usual reference to the Master was directed. *Ib.*

See also "Reformation of Mortgage," 3.

INDEX TO THE
FRAUDULENT INTENT.

See "Insolvency," 1, 4.

FRAUDULENT PREFERENCE.

1. A man in insolvent circumstances was sued about the same time, by two creditors, one of the plaintiffs being his son. To the one action he entered a defence, while to the other—that brought by his son—he made no defence, by reason of which judgment was obtained therein, and all his effects sold, which were bought in by an agent of the son, the whole realizing less than the debt, interest, and costs. The amount claimed by the son was admitted to be a *bona fide* debt. The Court [SPRAGGE, C.,] *Held*, that the refraining from putting in a defence to the action brought by the son was not such a facilitating of his recovering judgment as was prohibited by the statute—(R. S. O. ch. 118) in this following *Young v. Christie*, ante vol. vii. p. 317.

Labatt v. Bixel, 593.

See also, on this point, *King v. Duncan*, post vol. xxix. p. 113.

2. In order to make up sufficient to satisfy the balance of the son's claim, the defendant in the action was urged to make an assignment to his son of all his book debts, which he did, thereby denuding himself of all property :

Held, that as the book debts could be seized under an execution, the assignment thereof was a fraudulent preference within the Act; and the assignment being declared void, the son was ordered to account for the moneys received thereunder. Under the circumstances no costs were allowed to either party. *Ib.*

GARNISHMENT.

See "Equitable Garnishment."

GENERAL ORDERS.

See "Practice," 1.

GROUPING CLAUSES IN ACTS.

See "Statutes," &c.

HEADINGS.

See "Statutes, Construction of."

HUSBAND AND WIFE.

The widow of the intestate claimed against his estate a sum of \$700, which she alleged he had borrowed from her after her marriage, and about ten years before his death, for the purpose of buying a stock in trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C. cap 73. Evidence was given in corroboration of the claimant to the effect that—"He (*Laws*) told me he had got \$600 or \$700 from his wife. She had got a little money. He said he had paid that money for the things he had in the store. This was after he had bought *L. out*. * * He said his wife had helped him to \$600 or \$700. * * I understood he had used the money to buy out the business."

Held, affirming the order of the Chancellor, reversing the finding of the Master at Hamilton, that she could not recover.

Per SPRAGGE, C., and BLAKE, V.C.—The evidence of the widow was not sufficiently corroborated.

Per PROUDFOOT, V. C.—The evidence that she chose in action was originally hers, and that she gave it to her husband, was corroborated, and this corroboration was sufficient to support her own evidence that it was a loan; but the C. S. U. C. cap. 73, gave her the right to assert her proprietorship as against her husband, and as incident thereto the right to bring a suit against him; to which proceedings however the Statute of Limitations was a bar, and therefore her remedy was gone.

Re Laws—*Laws v. Laws*, 382.

See also "Fraudulent Conveyance," 3, 7, 8.

INCUMBRANCES.

See "Mortgage," &c., 7.

INDEPENDENT ADVICE.

See "Voluntary Deed."

INFANCY.

See "Title by Possession."

INFANT HEIR.

See "Power of Sale," 1.

INFRINGEMENT OF PATENT.

See "Patent of Invention," 3.

INJUNCTION.

1. A company was incorporated for the construction of a bridge across the Niagara River, which was to be "as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains;" and the company completed such bridge so as to permit of the running of trains across it, but there were not any facilities for the passage of ordinary traffic. The time limited for the completion of the work having elapsed, an information was filed, seeking to restrain the use of the bridge by a railway company to whom the same had been leased until put in a condition to be used for ordinary traffic, or the removal of the bridge as a nuisance; and seeking also to compel the company to permit its use by persons on foot, upon payment of the statutable tolls. It was shewn that the construction of the bridge was such that it could not be adapted to the purpose of general traffic, and that its condition was such that the use thereof by persons on foot even was attended with danger, yet that by a small outlay the bridge could be rendered comparatively safe for that purpose. The Court [SPRAGGE, C.] granted relief, so far as the use of the bridge by persons on foot was concerned; but, in view of the magnitude of the work sought to be removed, compared to the inconvenience to the public, caused by their being unable to use the bridge for ordinary traffic, refused to make a decree to abate the so-called nuisance, and refused the costs of the suit to either party.

The Attorney-General of Ontario *ex rel.* Barrett v.
The International Bridge Co., 65.

[Reversed on Appeal, and Information dismissed, with costs, 28th
November, 1881.]

2. The plaintiff and others, councillors of the town of Petrolia, attended a meeting of the Council on the 5th April. They were absent at the next meeting called for and held on the 31st May and thenceforward, without authorization, till the 7th of July, when, at a meeting of the Council, a resolution declaring their seats vacant and ordering a new election was put, and an amendment to refer the matter to the town solicitor was lost; whereupon the dissentients left the room, in consequence of which there was no quorum, when the original motion was put and carried:

Held, (1) that the three months should be counted from the 31st May, being the first meeting that the plaintiffs had not attended; and that the resolution was therefore void, as well as on the ground that there was no quorum present when it was passed; (2) that the Court had jurisdiction to entertain a motion for an injunction restraining the defendants from interfering with the plaintiffs in the exercise of their official duties; and that the injunction might be awarded upon an interlocutory application.

Mearns v. The Corporation of the Town of Petrolia, 98.

3. Five of the provisional directors of a Railway Company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in

alleged pursuance of such adjournment, without advertisement or notice under the statute :

Held, that the meeting of the six directors did not constitute a duly organized meeting of directors ; though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournment, it might have cured the irregularity.

McLaren v. Fiske, 352.

4. Although a man may be engaged in a perfectly legitimate trade or calling, he will not be permitted to carry on the same in such a manner as to cause a nuisance or unreasonable inconvenience to his neighbours, and in order to obtain an interlocutory injunction to restrain him so doing, it is not necessary for the plaintiff to shew that the damage is irreparable. Therefore, where a man was engaged for some time in a thickly inhabited part of the City of Toronto in the manufacture of gas receivers, and was in the month of February, 1881, engaged in contracts for the manufacture of vessels which required the joining together of boiler plates by riveting, which created so great a noise as to render the occupation of the plaintiff's house, distant only about fifteen feet from the factory, difficult, and whereby the wife of the plaintiff, who was the owner of the house, was kept in a nervous state of health, and a bill was filed in April, the Court [PROUDFOOT, V. C.,] upon an interlocutory application, restrained the defendant from "continuing his works so that the noise cause a nuisance to the plaintiff."

The fact that the nuisance, if a nuisance at all, was alleged to be a public one, and should be moved against by the Attorney-General, formed no ground for refusing relief to the plaintiff, although the property in respect of which the injury was sustained was the property of the wife of the plaintiff, not his own.

Hathaway v. Doig, 461.

[Reversed on Appeal, 17th June, 1881, on the ground that plaintiff was not the owner of the property injured, 6 App. R. 264.]

5. The owner of real estate in effecting a sale of a portion thereof covenanted with the purchaser that he would retain a certain square unbuilt upon, with the exception of one residence with the necessary outbuildings including porter's lodge ; the purchaser on his part covenanting that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law to be carried on upon the portion conveyed to him. A bill was filed alleging that the vendor and the defendant E. W., who resided with him, were in violation of the covenant erecting a house upon such square not within the exception in the covenant. The bill set forth the dimensions of the square, and alleged that the same was particularly shewn and delineated on the map of the city of Toronto published in 1857—and was situated between certain named streets.

Held, on demurrer for want of equity, that the square was pointed out with sufficient distinctness, and the fact that it comprised about six acres

of land while the portion conveyed to the purchaser was about one-fourth of an acre only, was not such a ground of hardship as would prevent the Court from interfering by injunction to restrain the breach of covenant, and *E. W.* being joined with the vendor in the erection of the house, she could not be heard to say she had not notice of the covenant, and the demurrer was overruled with costs.

VanKoughnet v. Denison and Winne, 485.

See also "Sale of Standing Timber."
"Trade Marks."

INOPERATIVE WILL.

See "Will, Invalidity of."

IRREPARABLE DAMAGE.

See "Injunction," 4.

INSANE DELUSION.

See "Will, Invalidity of."

INSOLVENCY.

1. The omission by an insolvent from his schedule of assets of any property or stocks, in order to render him liable to the consequences provided by the 56th and 140th sections of the Insolvent Act, must have been shewn to have been so omitted with a fraudulent intent.

McGee v. Campbell, 308.

2. A firm consisting of three members having become insolvent, the members thereof procured the usual discharge, which, so far as *C.*, one of the members was concerned, was impeached by a creditor of the firm, on the ground that *C.* had omitted from his schedule certain railway shares which it appeared had been allotted to *C.* at the original organization of the company in the same manner as shares were allotted to other persons, and marked paid-up shares, no money consideration however having been paid by the allottees, and no scrip issued for the shares, such persons being appointed directors of the undertaking and receiving no other compensation for their services. The shares however had not any money value whatever, and *C.* in his evidence swore that he had not thought of this stock when making up his schedule of assets, so utterly valueless was it. The Court [*SPRAGGE, C.*,] being of opinion that the excuse offered by *C.* was not untrue, held that there was no fraudulent or even wilful omission in respect of such stock.

Ib.

3. Prior to the time of *C.* making up his schedule he had, (during the absence of the president of the road in England for about a year endeavouring to raise funds for carrying on the undertaking,) acted as Vice-President and rendered services for which he hoped at some time to receive compensation, but no promise, express or implied, had been made to him; subsequently, however, and after *C.* had applied for his discharge, a resolution was passed, granting him a sum of \$5,000, which was given more as a gratuity, and with a view of relieving him in his distress, than as a payment of a debt, and *C.* was unaware of the resolution of the board granting this money until he had obtained his discharge.

Held, that under the circumstances, it could not be considered there was in strictness any debt due to *C.*; and in any event that the non-insertion of the money in the schedule was not a fraudulent concealment within the meaning of the Act.

Ib.

4. At the date of the insolvency a large number of shares of another railway was held by *C.* as trustee, such shares being of actual pecuniary value to *C.* as enabling him to be appointed a director of the company, and for some years he received a salary as director. The stock was shewn to have been worth about from 7 to 15 per cent., not on account of any anticipated dividends, but as a qualification for the directorate. At the date of the insolvency *C.*, according to the arrangement with the owners of this stock, was bound at any time he might be called upon to re-transfer it, in consequence of his failure to "give value" to it, but he was not called upon to re-transfer, nor had he been called upon to do so at the time the case was heard. He stated, however, in his evidence that he had been advised he could not properly insert this stock in his schedule of assets. Subsequently to the date of the deed of composition and discharge, and the filing of the certificate of the assignee, but eight days prior to the order of confirmation by the Judge *C.* acquired as his own property a portion of this stock.

Held, that the omission to bring such after-acquired stock in by a subsequent schedule of assets, was not a case of fraudulent concealment; and the bill by reason of the serious nature of the charges which the plaintiff must have established before he could succeed, was therefore dismissed, with costs.

[Since reheard.]

Ib.

5. *K.*, a trader, had a line of discount with the defendants to the extent of \$20,000, and had gradually increased his discounts so that his indebtedness to the bank reached \$40,000, when an arrangement was made that he should deposit notes and other securities as a means of further indemnifying the bank. In consequence thereof the bank continued to make further advances to *K.*, and he assigned sundry notes and bills to the bank, the last of such transactions having been carried out only two or three days before his being placed in insolvency, the agent of the bank, as he swore, having been in entire ignorance of the true state of his *K.*'s circumstances, caused by his reliance on the statements of the Mercantile Agency, and the plausibility of *K.*'s manner.

Held, that the transactions could not be viewed as having taken place in contemplation of insolvency, but were *bona fide* attempts on the part of the bank to enable K. to avoid insolvency proceedings, and carry on his business.

Nelles v. The Bank of Montreal, 449.

[Since argued in Appeal.]

See also "Warehouse Receipts," 2.

INSOLVENCY OF SURVIVING PARTNERS.

See "Partnership," 1.

INSUFFICIENCY OF NOTICE.

See "Power of Sale," 1, 2.

INTEREST, PAYMENT OF.

See "Mortgage," &c., 8.

INTERROGATION, WILL OBTAINED BY.

See "Mental Capacity."

INTERRUPTION OF POSSESSION.

See "Statute of Limitations," 4.

JOINT STOCK COMPANY.

At a meeting of the shareholders of a company, the capital stock of which was held by a few, a chairman was elected by a majority of the votes of those present, without regard to the stock held by them. Two of the shareholders, who were also provisional directors, and who were candidates for re-election, were appointed scrutineers in the same manner, and directors were then elected, excluding the plaintiff. The plaintiff was president of the company, and held a large amount of stock, sufficient with that held by those who were favourable to him to have controlled the vote if it had been taken according to shares. It was the duty of the scrutineers to decide as to what votes were valid, and they also, with the aid of legal advice, interpreted an instrument under which the plaintiff had advanced a large sum of money to start the company, and which provided for the future disposition of the shares of the company, held by the plaintiff as a security for his advances, and allowed certain persons to vote as being *cestuis que trust* of a portion of such shares.

Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate that they were disqualified from so acting, and the election was set aside, and a new election ordered, with costs to be paid by defendants.

Dickson v. McMurray, 533.

JUDGMENT AND EXECUTION.

See "Judgment Creditor," 1.

JUDGMENT CREDITOR.

1. In a suit to redeem, the plaintiff was a judgment creditor with execution in the hands of the sheriff against the lands of the defendant *S.*, which lands were subject to a mortgage to *L.*, whose executors were also defendants. At the hearing the Court [SPRAGUE, C.] declared the plaintiff entitled to the same relief as upon a bill by a *paisne* incumbrancer against a prior mortgagee and the mortgagor, and that, notwithstanding R. S. O. ch. 49, sec. 5, inasmuch as he could not establish his right in the County Court in which he had recovered his judgment, so as to obtain an effectual remedy as that sought in the redemption suit, he might resort to equity to obtain relief.

Chamberlain v. Sovais, 404.

2. The executors of *B.* were also liable upon the judgment recovered by the plaintiff, *B.* having been a defendant in the action, and by their answer set up that they were liable only as sureties for the defendant *S.* All parties interested were represented in the suit, and no one objecting thereto, a reference was granted at the instance of *B.*'s executors, in order that they might establish the fact of suretyship, in which case they would be entitled to the same relief as was granted in *Campbell v. Robinson*, ante vol. xxvii. p. 634.

Id.

JURISDICTION.

See "Arbitration," 1.

LAND ACQUIRED BY RAILWAY COMPANY ON CONDITION, &c.

See "Railway Company," 4, 5.

LAPSE OF TIME.

See "Mechanics' Lien Act," 1, 2.

LAW AND EQUITY, PROCEEDING AT AND IN.

See "Mortgage," 3.

LEGACY ON TERMINATION OF LIFE ESTATE.

See "Will, Construction of," 1.

LIABILITY OF CO-SURETIES TO CONTRIBUTE.

See "Loan and Savings Society."

LIABILITY OF PURCHASER OF PART OF
MORTGAGE ESTATE.

See "Mortgage," &c., 5.

LIEN FOR UNPAID PURCHASE MONEY.

See "Sale of Standing Timber."

LIFE ESTATE, LEGACY ON TERMINATION OF.

See "Will, Construction of," 1.

LOAN AND SAVINGS SOCIETY.

A loan and savings society appointed *G.* their treasurer; and the plaintiffs and defendant by two separate bonds became sureties for the due discharge of the duties of such officer. By several Acts of the Legislature the society was incorporated, and its powers materially increased, and *G.* appointed its manager, the duties of which it was shewn were similar to those of treasurer, the name of manager being given simply as one of honour, and did not involve any additional duties. *G.* made default in his office, and a suit was instituted by the society against all the sureties, which was compromised by the plaintiffs paying about one-half of the sum claimed by the society.

Held, that the defendant was bound to contribute his share of the money so paid, and that the change in the name of the officer afforded no defence to the claim of the plaintiffs.

Held, also, that in such a case the entries of *G.* in the books of the society were not evidence against the sureties during the lifetime of *G.*

Murray v. Gibson, 12.

LUNATIC.

[PROVING CLAIMS AGAINST ESTATE OF.]

See "Execution Creditors," 2.

"MAKE AND MAINTAIN," CONSTRUCTION OF.

See "Railway Company," 2.

MANAGER.

See "Loan and Savings Society."

MARRIAGE.

1. In order to render void a ceremony of marriage, otherwise valid, on the ground that the man was intoxicated, it must be shewn that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of knowing what he was about.

Roblin v. Roblin, 439.

2. *Semble*: A combination amongst persons, friendly to a woman, to induce a man to consent to marry her, it not being shewn that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid the marriage. *Id.*

3. A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about is voidable only and may be ratified and confirmed. *Id.*

4. Three years after the ceremony of marriage, which the man alleged he had been induced to enter into while under arrest and intoxicated, an action at law was brought against him for necessities furnished to the woman, and for expenses incurred in the burial of her child, in which the validity of the marriage was distinctly put in issue. Before the cause could be called on for trial, the man signed a memorandum indorsed on the record in which he admitted the existence and validity of the marriage, and consented to a verdict for the plaintiff in the action;

Held, that if the marriage was previously voidable, it was thereby confirmed. *Id.*

5. In a suit by the woman for alimony brought seventeen years after the marriage on the ground of refusal by the man to receive her as his wife, he set up the invalidity of the marriage, but while under examination stated that if it was determined that she was his wife he would receive her as such. The Court [PROUDFOOT, V. C.,] while finding there was a valid marriage directed that upon the defendant undertaking to receive

the plaintiff as his wife, the bill should be dismissed; but ordered the defendant to pay the costs between solicitor and client. *Ib.*

MARRIED WOMAN.

See "Demurrer," 1.

"Will," &c., 4.

MECHANICS' LIEN ACT.

1. The plaintiffs delivered and set up for the defendant a boiler and engine, supplied by themselves, in September, 1878, upon certain terms of credit, which expired on the 25th April, 1879. Registration of the lien was effected on the 23rd December, 1878, and a bill to enforce the lien was filed on the 31st May, 1879.

Held, that the effect of the delay in the registration of the lien was, that the lien under the Act had ceased to exist, notwithstanding the plaintiff had done some immaterial work upon the machinery late in December, 1878; the thirty days within which the registration was to be effected being to be computed not from the time such alterations were made, or the defects in the machinery were remedied, but from the time when it was supplied and placed, *i. e.*, in September, 1878.

Neill v. Carroll, 30.

[Affirmed on rehearing, p. 339.]

2. *Quære*, as to the effect of the Act when the credit does not expire until after thirty days from the completion of the work, and there has been no registration of lien. *Ib.*

MENTAL CAPACITY.

1. The testator, a man of education, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were obtained by the person preparing it by putting questions to the testator as to the disposition of his different properties, such will when drawn having been read over to the testator clause by clause, who expressed his assent to some of them while as to others he made intelligent remarks and some changes in the provisions thereof. The Court [BLAKE, V. C.,] in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate; although it was shewn that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act—that there was no

intention on his part to make the will—that he was a man who, when in possession of his mental faculties, was not likely to take suggestions from others—that not a single devise originated with the deceased—that the author of the will did not know what property the deceased had—that he admitted that if he had had this knowledge he would have spoken to him seriously on the subject of his relations, of whom there were several—that the will was inofficious—that the testator was 84—that it took two hours to prepare the will, although it covered but one foolscap sheet—and that they sent for and obtained the numbers of the lots from a neighbour, thus shewing that they could not obtain the information from the deceased.

Thomson v. Torrance, 253.

2. The residuary estate consisted of mortgages, the bequest of which, under the Mortmain Act, was declared invalid, and to belong to the next of kin of the testator, the plaintiffs in the suit.

Id.

MISMANAGEMENT OF ESTATE.

See "Executor," 1.

MIXING GOODS DEPOSITED.

See "Warehouse Receipts," 1.

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. *S.* being the holder of two mortgages, brought ejectment thereon, when the genuineness of the signatures to the instruments was disputed, notwithstanding which he recovered judgment in that action, and subsequently instituted proceedings in this Court seeking to obtain a sale of the mortgage premises and the usual order for deficiency. Owing to the extremely contradictory evidence adduced at the hearing, the Court [SPRAGGE, C.] refused to make the decree as asked, holding the evidence insufficient to establish the execution of the mortgages, as the plaintiff was bound to do, and dismissed the bill, with costs; but without prejudice to *S.* filing another bill if so advised, within twelve months from the date of that decree. After the lapse of more than twelve months the mortgagor filed a bill seeking to have the mortgages delivered up to be cancelled:

Held, that if the strict construction of such decree was that the point was *res judicata* it was erroneous, and the Court [SPRAGGE, C.] refusing to enforce it in this proceeding by making a decree in favour of the plaintiff, dismissed the bill with costs.

Mitchell v. Strathy, 80.

2. A mortgagor paid off a mortgage after the mortgagee had assigned it, together with a second mortgage obtained by fraud from the same mortgagor to the plaintiffs, who did not procure the mortgagor to join in the assignment of either, or notify him thereof :

Held, that the assignee took the mortgages subject to the equities between the original parties thereto ; and as the original mortgagee could not, if plaintiff, have recovered upon one mortgage because paid, nor upon the other, because invalid, so neither could his assignee.

Wilson v. Kyle, 104.

3. A mortgagee proceeded on the same day to foreclose the property of the mortgagor and his sureties, by several bills upon their respective mortgages, and to sue at law in different actions the same parties, on notes held by the plaintiffs, to which the mortgages were collateral.

Held, that only one suit in equity was necessary, as all parties might have been brought before the Court therein, all remedies given which might have been obtained at law, and all rights more conveniently adjusted between the parties in one than in several suits ; and the Court would not be deterred from granting relief by the circumstance of a decree being complicated.

Merchants' Bank v. Sparkes, 108.

4. *M.*, the owner of Blackacre and Whiteacre, subject to mortgages for \$1,600 and \$500, on both parcels in the same hand, sold Blackacre to *C.*, subject to the mortgage for \$1,600, which by the arrangement *C.* was to pay off. *M.* afterwards sold Whiteacre to *N.*, subject to the mortgage for \$500. *C.* died, and his representatives sold Blackacre to a *bonâ fide* purchaser, who covenanted to pay off the \$1,600 mortgage. Default having been made in payment, the mortgagees, in order to enforce payment, offered both the estates for sale, when *N.*, in order to protect his title to Whiteacre, purchased both estates, and thereupon instituted proceedings against *M.* and the representatives of *C.* to compel payment of the mortgage debt of \$1,600. A demurrer, for want of equity, by the representatives of *C.* was allowed, the demand, which was a personal one against them, remaining with *M.*, the original vendor.

Norris v. Meadows, 334.

[Affirmed on Appeal, 24th March, 1882.]

5. *B.*, the owner of two parcels of land (*D* and *E*), mortgaged them to one *J.*, who assigned the security, after which *J.* obtained from *B.* a transfer of his equity of redemption. Shortly afterwards *J.* sold a portion of *D* to *P.*, who sold and conveyed to the plaintiff, who a few days later obtained from *J.* a conveyance of the remainder of the lot (*D*), the plaintiff on each occasion paying his purchase money in full and receiving a conveyance with covenants as to title ; and *J.* at a subsequent date sold the remaining lot (*E*) to one *C.*, who sold and conveyed his interest to the defendant *Canavan*. The agreement throughout was that *J.* was to discharge the mortgage.

The Court [BLAKE, V.C.,] under these circumstances, *Held*, that the plaintiff was entitled to call upon the owners of lot *E* to the extent of the value thereof to indemnify him against the claim under the mortgage, that lot being liable in their hands for the full amount of the incumbrance, in the same manner and to the same extent as it had been liable in the hands of *J.*; in this respect following the cases of *Parker v. Glover*, ante vol. xxiv., p. 537; *Clark v. Bogart*, ante vol. xxvii. p. 450; *Nicholls v. Watson*, ante vol. xxiii. p. 606; *Clarkson v. Scott*, ante vol. xxv. p. 373.

Pierce v. Canavan, 356.

[Affirmed on Appeal, 24th March, 1882.]

6. *C.* being the equitable owner of land contracted by writing (registered) to sell to the defendant on 13th of February, 1877. Part of the purchase money was paid down. *C.* obtained an order on 17th April, 1878, vesting the land in him—there were two mortgages on the registry prior to one in favor of the Loan Company. On the 17th May the defendant gave an order on the Loan Company to pay the proceeds of a loan to their local agent, who was informed by one *J.*, a solicitor who had control of the two prior mortgages, that they were paid off and that he would get them discharged. Thereupon the agent paid *C.* the balance of his unpaid purchase money, and *C.* on 25th May, 1878, conveyed to the defendant. The Loan Company's mortgage was dated 15th May, and registered the 25th May.

Held, on appeal from the Master [affirming his report] that the Loan Company could not stand in *C.*'s place and claim priority in respect of his lien for unpaid purchase money over the prior mortgages, following *Imperial L. & I. Co. v. O'Sullivan*, 8 Pr. R. 162.

Watson v. Dowser, 478.

7. The Loan Company's mortgage contained this clause, and it is hereby declared "that in the event of the money hereby advanced, or any part thereof, being applied to the payment of any charge or incumbrance, the company shall stand in the position and be entitled to all the equities of the person or persons so paid off."

Held, that this provision could not affect prior mortgagees who were no parties to it; and *quere* whether it would apply to the discharge of unpaid purchase money, which does not constitute a charge or incumbrance in the proper meaning of those terms.

Id.

8. The possession of a stranger which has not ripened into a title as against the owner of land, will not enure to the benefit of him so in possession as against the mortgagee, so long as his interest is regularly paid by the owner.

Chamberlain v. Clark, 454.

See also "Judgment Creditor."

"Principal and Agent," 1, 2.

"Redemption."

"Statute of Limitations," 4, 5.

INDEX TO THE
MORTMAIN ACTS.

See "Mental Capacity."

MUNICIPAL COUNCIL.

Sect. 195 of the Municipal Act provides that the effect of a party disclaiming the office to which he has been elected shall be to give the same to the candidate having the next highest number of votes.

Held, that this meant the candidate having such number of votes who has not been elected to the council, therefore, where the plaintiff was the fourth in that order, the three highest on the list having been declared elected, and one at the head of the poll resigned his seat, an injunction was granted to restrain the reeve and councillors of the village from preventing the plaintiff entering upon and discharging the duties of such office.

Smith v. Petersville, 599.

The notice of the party resigning the office stated that he resigned his "seat" in the council.

Held, sufficient; and that the plaintiff was entitled to his costs, although the Act requires notice of a resignation of the "office" to be given. *Id.*

MUNICIPAL COUNCILLORS.

See "Injunction," 2.

"Municipal Council," 1, 2.

MUTUAL INSURANCE COMPANY.

1. Trustees being indebted to the plaintiffs and holding stock in the defendants' company assigned the stock to the latter in consideration of a sum expressed to be paid by them for the trustees to the plaintiffs. The sum was paid by the issue of the defendants' debenture to the plaintiffs.

Held, that the transaction did not constitute a "loan of money" from the plaintiffs to the defendants within the meaning of 31 Vict. ch. 52, sec. 12 (O.), and that the issue of the debenture was therefore *ultra vires*.

Bank of Toronto v. Beaver and Toronto Mutual
Insurance Company, 57.

2. Where an application was made to the Court to add the persons who had signed premium notes as parties in the Master's office, and to direct the Master to assess the amounts due upon the notes, and to order payment of the same to the Receiver from time to time, it was shewn that the directors had not made any assessments upon the notes pursuant to R. S. O. ch. 161, secs. 45 *et seq.*

Held, that as the liability attached only upon such assessment by the Directors, the Court should not add to, or alter the liability of the parties who had made the notes by referring it to the Master or a Receiver to do that which the directors only could do, clause 75 of 36 Vict. ch. 44, which gave power to a Receiver to do this, having been omitted from the statute on revision.

Hill v. Merchants and Manufacturers' Ins. Co., 560.

See also "Fire Insurance."

NOTICE OF RESIGNATION OF SEAT.

See "Municipal Council," 2.

NUISANCE.

See "Injunction," 4.

OFFICE, RESIGNATION OF.

See "Municipal Council," 1, 2.

OFFICERS OF CORPORATION,

[IRREGULARLY APPOINTED.]

One *T.*, who acted in the capacity of Secretary-Treasurer of the plaintiffs, who had not been appointed in writing, and had not given security as required by the statute in that behalf, absconded with certain moneys which had been received by him as such Secretary-Treasurer from the defendants. The plaintiffs had recognized *T.* as the Secretary-Treasurer by entrusting him with the custody of their books and papers, by allowing him to receive moneys for them, by auditing his accounts and receiving and approving of the auditor's reports.

Held, that R. S. O. cap. 204, sec. 99, which provides that, in the case of a rural school section corporation, the resolution, action, or proceeding of at least two of the trustees shall be necessary in order lawfully to bind such corporation, does not apply to acts of duty of the Secretary-Treasurer; and that payments by the municipality of school moneys to *T.* was binding on the trustees.

Held, also that, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment.

School Trustees of the Township of Hamilton v. Neil, 408.

INDEX TO THE ONUS OF PROOF.

See "Proof of Sale," 3.

PAROL AGREEMENT.

See "Railway Company," 2.

PARTIES.

1. *The Attorney-General of Ontario* is the proper officer to complain of a violation of the rights of the public of Ontario, which the Court has the power to restrain, and that incident to such power the Court can prescribe by what means the safety and convenience of the public can be secured in the exercise of those rights. In the exercise of such power, the Court [SPRAGGE, C.,] directed what alterations were necessary in the construction of the International Bridge, in order to secure the safety of the public while using the same. For this purpose, *The Attorney-General* of the Dominion need not be present to protect the rights of the Crown in the Dominion.

The Attorney-General of Ontario ex rel. Barrett v. The International Bridge Co., 65.

2. To a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation, the treasurer of the municipality is not a proper party.

School Trustees of Hamilton v. Neil, 408.

See also "Pleading," 1, 2.

"Practice," 3.

"Railway Company," 2.

PARTNERSHIP.

Upon the death of one member of a firm, and the subsequent insolvency of the surviving partners, the joint estate passes to their assignee in insolvency. But where the capital of surviving parties having been lost, they, while the estate was supposed to be solvent, conveyed the same to a trustee for creditors upon the request of the executrix of a deceased partner, in consideration of a release from her of all liabilities, and the executrix afterwards, upon obtaining probate, conveyed her interest to the trustee; and subsequently, through a shrinkage in value, the estate became insufficient to meet the liabilities, it was

Held, that by the assignment to the trustee, at the request of the executrix, for valuable consideration, they had parted with all interest in

the estate, and nothing passed to the plaintiff as assignee under proceedings in insolvency taken on the supposition that the assignment to the trustee was an act of insolvency; and that the assignment to the trustee not being questioned on the ground of fraud, the assignee of the survivors was precluded from any inquiry.

Davidson v. Papps, 91.

PASSING ACCOUNTS.

See "Receiver."

PATENT OF INVENTION.

1. In November, 1879, the plaintiff obtained a patent for a new and useful improvement in bakers' ovens, which was expressed to be "In combination with a bakers' oven, a furnace, 'D,' set within the oven but below the sole, 'A.'" This patent he surrendered, and a new one issued in August, 1880, on the ground that the first was inoperative by reason of the insufficiency of the description. The new patent was for the unexpired portion of the five years covered by the first patent. The claim of invention, as set forth in the specification, was, "1st. In a fire-pot or furnace placed within a baker's oven below the sole thereof, and provided with a door situated above the grate. 2nd. In a fire-pot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide. 3rd. In a flue, 'H,' leading from below the grate, 'B,' to the flue, 'E.' 4th. In a baker's oven provided with a circular tilting grate situated below the sole of the oven, and provided with a door. 5th. In a cinder grate, 'F,' placed beneath the fire-grate, 'B,' in combination with a flue, 'H.'" The plaintiff, in his specifications, claimed all these as his inventions; in his evidence he claimed each of the combinations to be the subject of the patent.

Held (1), if the plaintiff was correct in the latter view, that the last four combinations being new, the first patent could not have been inoperative as to them; and the second patent in respect of these must be construed as an independent one, issuing for the first time on its date, and as all other than the first combination had been used for upwards of a year prior to the patent, he was not entitled to a patent therefor; (2), that the 5th combination of previously known articles, as applied to a baker's oven, which was productive of results which were new and useful to the trade, was a subject of a patent.

Hunter v. Carrick, 489.

2. Some of the devices were in use before the patent, but numerous witnesses engaged in baking testified that they never knew of the combination before the plaintiff's invention.

Held, that the defence for want of novelty failed.

Held, also, that the first combination in the patent of 1880 was such an amendment as is contemplated by sec. 19 of the Act 35 Vict. ch. 26.

Ib.

3. The defendant's oven was completed early in July, 1880, and before the re-issue of the plaintiff's patent; she had in use the first and fourth combinations, and continued to use them after such re-issue.

Held, that there was not any remedy for the intermediate user, as the patent was then inoperative; but as to any subsequent infringement, the user under a defective patent could not operate as a defence.

Ib.

4. The plaintiff having succeeded as to part only of his claim, no costs were given to either party up to the hearing. A reference as to damages having been directed, subsequent costs were ordered to abide the result.

Ib.

PAYMENT FOR LANDS TAKEN FOR ROAD.

See "Railway Company," 3.

PAYMENT OF INTEREST.

See "Mortgage," &c., 8.

PAYMENT TO MORTGAGEE.

[AFTER ASSIGNMENT OF MORTGAGE.]

See "Mortgage," 2.

PERSONALTY OR REALTY.

See "Sale of Standing Timber."

PETITION OF RIGHT.

1. In order to establish a right to damages as against the Crown for having, as alleged, obstructed the flow of water to the mills of the suppliants, it is incumbent on the suppliants to shew that less than the natural volume of water forming the stream reaches their mill on account of such alleged obstruction: therefore, where it appeared upon the evidence that certain waters alleged to have been penned back by a dam would never have reached the mills of the suppliants, and the extreme and unprecedented dryness of the season had had an appreciable effect upon the supply of water.

Held, that the evidence did not sustain the petition, which alleged that

the suppliants sustained damage by the erection of a dam across the river, above their dam.

The Muskoka Mill Co. v. The Queen, 563.

2. The maxim that the Crown can do no wrong, applies to alleged tortious acts of the officers of a public department of Ontario, and a petition of right will not lie for such alleged wrongful acts under 35 Vict. ch. 13, O., which creates no new right in the subject against the Crown, but relates rather to procedure only. *Id.*

3. The redress of a subject suffering damage from such acts, if unauthorized by statute, would be against the subject who committed the wrong, and not against the Crown. *Id.*

4. In dealing with the question of costs upon a petition of right, the same rule will be applied as if the question was one between subject and subject; therefore, where on a petition of right the Crown instead of demurring, went to a hearing, the Court [SPRAGGE, C.,] on dismissing the petition, allowed to the Crown such costs only as would have been taxed had the liability of the Crown been raised by demurrer. *Id.*

“PLACE,” MEANING OF.

See “Railway Company,” 4.

PLEADING.

1. Where certain shareholders in a company joined with the company as plaintiffs as a precautionary measure merely in case it should transpire that their co-plaintiffs, the company, were not entitled or were unwilling to sue, the Court [BLAKE, V.C.,] refused to allow a demurrer for want of equity, as the objection was purely of a formal nature.

The City Light and Heating Company of London et al. v. Daniel Macfie et al., 363.

2. A demurrer to a bill filed by shareholders of an incorporated company on behalf of themselves and all other shareholders except the defendants, in which the company were joined as co-plaintiffs, attacking a transaction whereby all the shareholders, including some of those whom the plaintiffs assumed to represent, received shares in the transaction sought to be impeached, was allowed. *Id.*

3. A railway company paid to tenants for life the full price of the land conveyed by them to the company for their line of railway, and on the cesser of the life-estate the parties entitled in remainder filed a bill stating that the railway company assumed to purchase the lands for the right of way; that the company alleged that they had paid the full consideration

for the land to the tenants for life ; submitting that *even if* the company did make such payment they did so in their own wrong, and asking for payment of the plaintiffs' share of the purchase money :

Held (1), that the word "assumed" was a sufficient allegation of the fact of sale, and conveyance. But (2) that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground.

Owston v. The Grand Trunk Railway Company, 428.

See also "Conveyance in Fee."

"Railway Company," 3.

"Sale under Power."

"Statute of Limitations," 3.

POSSESSION OF STRANGERS.

See "Mortgage," &c., 8.

POSSESSION, REDUCTION INTO.

See "Husband and Wife."

POSSESSION, TITLE BY.

See "Statute of Limitations," 3.

POWER OF SALE.

1. A power of sale in a mortgage required notice upon default to be given to the mortgagor, "his heirs, executors, or administrators," or left for him or them at his or their last or usual place of abode, before exercising the power.

Held, that a notice which was served upon the widow, who was also the administratrix of the deceased mortgagor, and addressed to her as such widow, was insufficient, because not served also upon the heir-at-law of the mortgagor, although only an infant about three years of age ; and that the sale under the power was therefore void.

Bartlett v. Jull, 140.

2. The notice stated only that unless payment was made proceedings would be instituted to obtain possession.

Held, also, that on this ground the notice was insufficient to support a sale.

Ib.

3. In proceeding to impeach a conveyance executed in pursuance of such a sale the purchaser, or those claiming under him, must shew a due exercise of the power of sale; the *onus* of impeaching it is not upon the party alleging the invalidity of the deed. *Id.*

See also "Principal and Agent," 1.

PRACTICE.

1. In proceeding upon a reference under a decree, the Master cannot under the General Orders 244, 245, order a person to be made a party to the suit against whom any relief is sought; and where in proceeding under a decree for the administration of a testator's estate, the Master directed one *D.*, who had been in partnership with the testator up to the time of his death to be made a party, and requiring him with the executors to bring in under oath an account of the partnership dealings, against which *D.* appealed, the Court [*PROUDFOOT, V. C.*,] held the object of making *D.* a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as *D.*, so far as discovery was concerned, could only be regarded as a witness.

Hopper v. Harrison, 22.

2. Where the defendants in a suit reside in this country, and the principal office of the plaintiffs is in England, and a contract is entered into there between the parties which is to be executed in New York, a suit in respect thereof may be instituted in this Province.

The Direct United States Cable Co. (Limited) v. The Dominion Telegraph Co. of Canada, 648.

3. In a suit in this Court to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs, for irregularity in such nomination:

Held, that the arbitrators being necessary parties and the defendants resident in this country, the arbitrators, though resident out of the jurisdiction, were properly made defendants to the bill. *Id.*

[Since argued in Appeal.]

See also "Cross Bill."

"Foreclosure, 1.

"Parties," 1.

"Petition of Right," 4.

"Statute of Limitations," 2.

"Vendors and Purchasers' Act."

PREFERENTIAL TRANSFER.

See "Insolvency," 4.

PREMIUM NOTES—ASSESSMENT ON.

See "Mutual Insurance Co.," 2.

PRINCIPAL AND AGENT.

1. The rule of equity which prevents an agent acquiring a benefit for himself in any dealings with the estate of the agency acted upon where an agent had been employed to sell or exchange certain land of the principal, which, however, the agent had been unable to effect, and the property was shortly after offered for sale by auction under a power of sale in a mortgage, when the agent bid for and became the purchaser. The Court [SPRAGGE, C.] in a suit impeaching the purchase, declared the agent a trustee for the principal: but as the plaintiff made several unfounded charges of fraud and other misconduct, the relief asked was given, without costs.

Thompson v. Holman, 35.

2. The mortgagee, at whose instance the sale had been effected, having been made a defendant to the bill, and charges made of his having combined with the agent to defraud the principal, all of which were negatived, the bill as against him was dismissed, with costs. *Ih.*

3. The costs of proceedings to obtain a sale of mortgage premises are such a charge upon the estate as will entitle the mortgagee to proceed to a sale of the property in the event of non-payment. *Ih.*

PRINCIPAL AND SURETY.

The testator by his will left money to his children, which was to be paid to them on their coming of age, and be deposited by the executors in a savings bank in the meantime. One of the executors appropriated and set apart certain moneys of his testator to answer the trusts of the will, which moneys were afterwards paid by him to the solicitor of the guardian of the infants, who made default in payment over of the same, and the amount never reached the hands of the guardian.

Held, that the moneys by the act of setting apart had become, in the hands of the executor, impressed with the trusts of the will, and he could not properly pay the same to the guardian, nor could the guardian properly receive the amount; and, although the fund never reached the hands of the guardian so as to render her surety liable to make good the amount, yet, under the circumstances, the guardian was personally responsible for the money so paid to her solicitor, and a decree to that effect was pronounced, with costs; though as against the surety the bill was dismissed, with costs.

Galbraith v. Duncombe, 27.

See also "Judgment Creditor," 2.

"Mortgage," &c., 3.

PRIORITY.

See "Mortgage," &c., 6.

PROMISE NOT TO BE PERFORMED WITHIN A YEAR.

See "Statute of Frauds."

PROMISE TO LEAVE MONEY BY WILL.

The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was subject to a mortgage, saying that if he would do so, and have the property conveyed to his (plaintiff's) wife, he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the instalments on the mortgage and the plaintiff was compelled to pay it off himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for them; that he would pay plaintiff \$250 a year for ten years, and bequeath to his wife \$1,000. By the will, however, only \$100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement, or for payment of damages by reason of the breach thereof. The only direct evidence was that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for \$260 and \$200, respectively, expressed to be on account of money left her by her father's will; and witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in his wife's name, and that he was making the payments as the plaintiff had so taken the deed:

Held, that there was sufficient corroboration of the evidence of the plaintiff as required by the statute (R. S. O. ch. 62), and that the second agreement or promise by the testator was not voluntary, the former promise, even if barred by the statute, being a sufficient consideration, as well as the conveyance to the daughter made in pursuance of it; and a decree was made for payment of the legacy of \$1,000, less the two sums of \$260 and \$200, with interest from one year after the death of the testator on the balance.

Halleran v. Moon, 319.

PROOF OF TITLE.

See "Statute of Limitations," 3.

90—VOL. XXVIII GR.

INDEX TO THE
PROPERTY AND CIVIL RIGHTS.

See "Warehouse Receipts," 3.

PROVISIONAL DIRECTORS.

See "Injunction," 3.

PUBLIC NUISANCE.

See "Injunction," 4.

PURCHASE FOR VALUE.

See "Execution Creditors," 1.

PURCHASE OF RIGHT OF WAY.

See "Pleading," 3.

QUIETING TITLES' ACT.

See "Title by Possession."

QUORUM, WANT OF.

See "Injunction," 2.

RAILWAY COMPANY.

1. An engineer of the defendants, whose duty it was to obtain transfers of land and determine the situation of station houses, procured from the plaintiffs, for nominal considerations, grants of land for a station house and ground, representing that the station would be put as desired by the plaintiffs at a certain point, advantageous to both. The deed of the plaintiff *S.* contained this proviso: "Provided that the said company, their successors and assigns, do erect and maintain on the said lands a station for the accommodation of passengers and freight, and name the same *B.*" The station was erected on the land in the deed containing this proviso, but not at the point represented.

Held, that though the plaintiffs had the expectation that the station would have been placed where they desired, yet there had been no deceit practised by the defendants' engineer for the purpose of obtaining the grants of the land; that the engineer had no power to bind the defen-

dants to such a thing, and that the defendants had done all they were bound to do by observing the proviso in the deed, which called for the erection of the station house on the lands without specifying any particular point.

Schliehauf and Oxford v. Canada Southern Railway Company, 236.

2. The owner of land conveyed a right of way over his land to the defendants in 1869, and the deed contained the following stipulation: "The company to make and maintain a farm crossing, with gates at the present farm lanes, the fence at crossing to be returned as much as possible." *R.* the company's engineer treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised if he should find a second crossing necessary he would, so far as in him lay, get it done, and the deed was executed upon this understanding.

Held, [reversing the decree of *PROUDFOOT, V. C.*, ante vol. xxvii p. 95,] that the defendants could not be compelled to make a second crossing for use in winter; and that upon the construction of the words above set forth they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow.

PROUDFOOT, V. C., dissenting.

Cameron v. Wellington, Grey, and Bruce Railway Company, 327.

3. An "action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come to the hands of another." Therefore, where a railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life, seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman.

Held, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance, and a demurrer by the executors was overruled with costs, on the ground that the company were entitled to a remedy over against them for the amount overpaid them, and on the additional ground that the bill alleged all facts necessary to entitle the plaintiffs to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the company to the executors * * * of money, to a proportion of which the plaintiffs were entitled, and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs."

Owston v. The Grand Trunk Railway Co., 431.

4. The plaintiff being the owner of a tract of land near Prescott, on the 29th of October, 1849, agreed with the contractors engaged in the laying out of the railway of the defendants, and in acquiring lands and rights of way for the construction thereof, *in consideration of their placing the station of the railway for Prescott upon his land*, to convey to the contractors, their heirs, &c., six acres of such land for that purpose, and, if necessary, for the purposes of such station, to allow them to take an additional quantity, not exceeding in all ten acres. The station was erected in 1855 on these lands, and used by the company until 1864, when it was closed, and a station erected about one and a-half miles from the plaintiff's lands, and station buildings erected thereon, in consequence of which the plaintiff's remaining lands became depreciated in value.

Held, that under the circumstances, and considering amongst other things, that the plaintiff would derive a permanent advantage from the station being retained permanently on the lands conveyed by him, and which he had granted in fee, instead of simply giving the company a right of way, the words in italics had been used in a sense indicating permanency, the consideration for the conveyance would not be performed by merely erecting the station, and afterwards removing it, at the pleasure of the company. The defendants having entered upon and retained possession of the lands, so agreed to be conveyed, for more than twenty years before the filing of the present bill, 1876, afforded no defence under the Statute of Limitations, as up to a period much within the twenty years their possession could not be questioned, and no right of suit had accrued to the plaintiff until the use of the lands for the purposes of the station was discontinued in 1864.

Jessup v. Grand Trunk Railway Company, 583.

[Reversed on Appeal, 24th March, 1882.]

5. In such a case the Court [SPRAGGE, C.,] considered that the plaintiff would be entitled to a decree, referring it to the Master to inquire as to damages, or directing a restitution of the lands, if they were not again used by the company for the purpose for which they had been conveyed to them.

Ib.

6. It appearing in the case that the company had, since the institution of this suit, re-occupied the lands for the purposes of the station, that fact was to be recited in the decree, and leave reserved to the plaintiff to move in the cause should the company subsequently discontinue the use of these lands for the station.

Ib.

See also "Injunction," 1.

"Pleading," 3.

READING EVIDENCE IN FORMER SUIT.

See "Statute of Limitations," 2.

REALTY OR PERSONALTY.

See "Sale of Standing Timber."

RECEIVER.

The Receiver appointed to receive the proceeds of a railway company and apply the same in carrying on the business of the company, paid \$55.97 to the owner of land over which the line ran for the right of way over his lands, he having threatened to obstruct the passage of the company's trains unless paid. On passing his accounts the Master refused to allow the payment in favour of the Receiver, which ruling of the Master was affirmed on appeal, as such payment did not properly come under the head of "working expenses and outgoings" for the road, and which alone the Receiver was authorized to pay; but the Court [SPRAGGE, C.] gave the Receiver liberty to take out an order now for the allowance of this disbursement, on payment of the costs of the appeal—but refused to make such an order in respect of fees paid to the Solicitor of the company for the examination of titles, as there was not any evidence to shew that the payment was such as would have been sanctioned by the Court if applied to in the first instance for permission to pay the same.

Gooderham v. Toronto and Nipissing Railway Co.—
Fox v. Toronto and Nipissing Railway Co., 212.

[Since argued in Appeal.]

See also "Mutual Insurance Company," 2.

REDEMPTION.

In proceeding under a consent decree to redeem, the defendant being in the position of a mortgagee brought in an account claiming \$905 to be due, while the Master found the balance to be only \$1.32.

Held, that as the defendant had advanced his claim honestly, and under a reasonable belief that the sum claimed was justly due, he was entitled, notwithstanding the insignificant sum remaining unpaid, to the benefit of the rule that a mortgagor coming to redeem is liable for the costs of suit where a balance is found in favour of the defendant.

Little v. Brunker, 191.

See also "Judgment Creditor," 1.

"Will," &c., 2.

REDUCTION INTO POSSESSION.

See "Husband and Wife," 1.

REFORMATION OF MORTGAGE.

1. A mortgage, which had been executed by the defendant *I.*, reciting that it had been agreed to be given to secure notes held by the plaintiffs, and containing covenants for title, was reformed, on parol evidence, by substituting for one of the parcels inserted by mistake, which did not belong to *I.*, another lot proved to be his at the time of creating the mortgage; and being the only other lot owned by him.

Bank of Toronto v. Irwin, 397.

2. Such a mortgage is not voluntary or without consideration so as to exclude reformation. *Id.*

3. After the creation of the mortgage, *M.* purchased from *I.* the substituted lot at an absurdly inadequate price, and the sale being otherwise attended with suspicion, was set aside as fraudulent under the Statute of Elizabeth. *Id.*

REGISTRY ACT.

1. *Quære*, whether a deed of land not specifying any particular lot by description is capable of registration.

Russell v. Russell, 419.

2. The plaintiff who claimed title under such a deed, was held entitled to an injunction to restrain a sale by an execution creditor, of the interest which her co-defendant in the execution would have had in land but for such deed; and she was not bound to attend the sheriff's sale, explain her interest, and protest. *Id.*

RELIEF.

See "Practice," 1

REPAIRING PROPERTY.

See "Mechanics' Lien Act," 1.

REPUGNANT LIMITATIONS.

See "Conveyance in Fee," 1.

RES JUDICATA.

See "Fraudulent Conveyance," 6.

"Mortgage," &c., 1.

"Statute of Limitations," 2.

RESTRAINING NUISANCES.

See "Injunction," 4.

RESIGNATION OF CANDIDATE AFTER ELECTION.

See "Municipal Council," 1, 2.

REVIVOR.

See "Statute of Limitations," 8.

RIGHT TO CALL ON PURCHASER TO PAY OFF
MORTGAGES.

See "Mortgage," 4.

SALE OF LAND SUBJECT TO MORTGAGE.

See "Mortgage," 4.

SALE OF STANDING TIMBER.

1. By agreement in writing, dated 15th October, 1873, *A.* agreed to sell and *B.* and *C.* agreed to purchase all the merchantable white and red pine timber, suitable for their purposes, standing, lying, or being on certain premises owned by *A.*, for the price or sum of \$600, payable, \$400 on date of agreement, and the balance in one year, with a provision that the timber should be cut and removed off the lands, on or before the 15th of October, 1881. It was further provided that *B.* and *C.*, their agents, representatives, or assigns, should have the right to enter upon the premises at all times during the period for which the agreement was to continue in force, for the purpose of cutting and removing said timber; and that if *C.* and *B.* should remove the whole of the timber off the land before the expiration of the year, they would pay the whole of the purchase money immediately after removing the said timber.

Held, [PROUDFOOT, V. C., *dissenting*], that this was an agreement for the sale of an interest in land; that *prima facie* the vendor was entitled to a lien for unpaid purchase money, and that the circumstance that the timber was purchased by *B.* and *C.*, for the purpose of being cut down and used at their mill as soon as possible, did not deprive the vendor of the right to the lien.

Held, also, that the last proviso in the agreement, as to immediate payment of the purchase money in case of removal of all the timber before the arrival of the time for payment of the \$200, did not operate to destroy the vendor's right to the lien.

Summers v. Cook, 179.

B. and *C.* did not pay the \$200, and after the expiration of a year from the date of the agreement assigned it to the defendants, who had no actual notice that the \$200 remained unpaid, but the agreement was registered against the lands.

Held, that the vendor was entitled to an injunction to prevent cutting and removing, by the defendants until the \$200 was paid. *Ib.*

Marshall v. Green, L. R. 1 C. P. Div. 33, commented upon and distinguished. *Ib.*

SALE UNDER POWER.

In a bill filed by a mortgagor against his son, a bidder at the sale by another one of the defendants, a *Loan Company*, to which bill the company and one *B.* were also defendants, it was alleged that it had been agreed between the son and *B.* that in consideration of the son's securing to *B.* a debt of the plaintiff, *B.* would advance the deposit necessary to enable the son to buy the land at the sale; that the son should attend and buy in the land, which he accordingly did; that in consequence of *B.*'s refusal to make the promised advance, the son was unable to carry out the sale; that the bidding of the son deterred others present from bidding, and that *B.* afterwards privately bought the land at a great undervalue to the loss of the plaintiff:

Held, on demurrer, that the bill sufficiently, though inartificially, alleged that by reason of *B.*'s agreement and refusal to make the advance agreed upon, he had occasioned an abortive sale, and profited thereby to the loss and damage of the plaintiff.

Campion v. Brackenridge, 201.

SCHEDULE, OMISSIONS FROM.

See "Insolvency," 1, 2, 3.

SCRUTINEERS.

See "Joint Stock Company."

SEAT.

[NOTICE OF RESIGNATION OF.]

See "Municipal Council," 2.

SECONDARY EVIDENCE.

See "Statute of Limitations," 2.

SETTING ASIDE MONEY FOR SPECIAL PURPOSE.

See "Principal and Surety," 1.

SIGNATURE OF PARTIES TO CONTRACT.

See "Specific Performance," 1.

SOLICITOR AND CLIENT.

Upon the taxation of solicitors' costs against their client, it was shewn that large sums of money belonging to their client had reached their hands, and after deducting the amount of the costs a considerable balance remained due to the client, for which he had, under the order of taxation, issued an execution, but the sheriff had been able to realize only a small portion of the debt; and thereupon a motion was made to strike the solicitors off the roll in default of payment of the amount remaining due. The Court [BLAKE, V.C.], however, in view of the fact that the client had treated the claim as a debt from the solicitors to himself, and proceeded to a sale of all that he could seize under execution, was of opinion that he could not fall back on a right which he had had and might have exercised, unless, in addition to the non-payment of the money, misconduct on the part of the solicitors could be shewn that would warrant the interference of the Court; and refused the application with costs.

Re Fletcher et al., 413.

SPECIFIC PERFORMANCE.

1. It is not necessary that the name of a party to a contract for the sale of property should be actually signed thereto; it is sufficient if the alleged contract is in writing and is subsequently recognized by the party thereto sought to be charged in any writing signed by him or his agent. Therefore, where property was sold by auction and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of the sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote, "Re S.'s purchase. We would like to have it closed," and, referring to certain representations made in advertisements of the sale, "they were not made any part of the contract of sale"

* * Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter, we will prepare at once and send you draft for approval;" and on a subsequent occasion, "Re S.'s purchase. Herewith please receive deed for approval;" and on another occasion: the vendor himself wrote, "I shall take immediate steps to enforce the contract."

Held, that there was sufficient in writing signed by the party to be charged to take the case out of the Statute of Frauds; and that the purchaser was entitled to a specific performance of the agreement for sale.

Stammers v. O'Donohoe, 297.

2. Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of land he is about to offer for sale, still he will not be permitted to make direct misstatements and misrepresentations as to matters of fact which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of property about to be sold described it as being "a farm of 81½ acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when in fact there was not any clearing or fencing made upon the premises, the Court [*BLAKE, V.C.*] in pronouncing a decree for specific performance at the instance of the purchaser, directed a reference to the Master to make an allowance in respect of the matters misrepresented, and ordered the vendor to pay the costs of the suit. *Id.*

STANDING TIMBER, SALE OF.

See "Sale," &c.

STATION BUILDINGS.

[AGREEMENT AS TO POSITION OF.]

See "Railway Company," 1.

STATION GROUNDS.

[DEEDS OF LANDS FOR.]

See "Railway Company," 1.

STATUTES, CONSTRUCTION OF.

Held, following *Eastern Counties, &c., R. W. Co. v. Marriage*, 9 H. L. Ca. 32; *Lang v. Kerr*, L. R. 3 App. Ca. 529; and *Van Norman v. Grant*, ante vol. xxvii. p. 498, that both secs. 10 and 11 R. S. O. cap. 49, are to be governed by the heading immediately preceding section 10; so that where the interest sought to be reached by the creditor has not been concealed by a fraudulent conveyance, the Judge has no authority to give summary relief under section 11; and a decree for partition issued by a local Master at the instance of a purchaser at Sheriff's sale, under an order made by a County Court Judge, where the interest which had been sold was that of one of four tenants in common in an equity of redemption in

land which was subject to two mortgages in different hands, was on appeal reversed, with costs.

Wood v. Hurl, 146.

2. *Cronn v. Chamberlain*, ante vol. xxvii. p. 551, as to the invalidity of such sale followed; *Donovan v. Bacon*, ante vol. xvi. p. 472 n. doubted.
Ib.

STATUTE OF FRAUDS.

The Court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time of making the agreement, where the consideration therefor has been executed.

Halleran v. Moon, 319.

STATUTE OF LIMITATIONS.

1. The plaintiff, who was a *cestui que trust* in remainder, acquired the legal estate three years after the death of the tenant for life. It was attempted to be shewn by the defendant, who, with her husband, had been in possession by herself or her tenants for eleven years when the tenant for life died, in 1875, that she was entitled to the land by length of possession:

Held, that the facts in the case would not support such a contention, as no laches could be imputed to the plaintiff for not having compelled the trustee to take proceedings to obtain possession at an earlier date, for his right had only been acquired on the death of the tenant for life, and therefore his claim to the land was not barred.

Adamson v. Adamson, 221.

2. A former suit had been instituted by the plaintiff, which had been dismissed, as the plaintiff had not acquired the legal estate until after the bill was filed.

Held, (1) that under such circumstances the question was not *res judicata*; and (2) that the evidence taken in the former suit and the examination of defendant by the plaintiff therein were admissible in the present one, the issue being practically the same.
Ib.

3. *B.* entered into possession of a small portion of a lot of land which he had fenced and cultivated, the lot being in a state of nature, and upon the agent of the owner discovering *B.* to be so in possession suffered *B.* to remain there, he agreeing to look after the property in order to protect the timber; and *B.* subsequently assumed to sell the whole to one *J.*, his grandson. On a bill filed by the owner, the Court [*SPRAGGE. C.*] *held* that under the circumstances the Statute of Limitations did not run in favour of *B.* so as to give him a title by possession, and that *J.* was not entitled to the benefit of the defence of "purchase for value without notice," he having omitted to allege that *B.* was seized; that *J.* believed

he was seized; that *B.* was in possession, and that the consideration for the transfer by *B.* to himself had been paid.

Subsequently, and in 1878, the plaintiff's agent again visited the property, and obtained *B.*'s signature to a memorandum agreeing to hold possession and look after the property for the plaintiff:

Held, a sufficient recognition of the title of the plaintiff, and that the defendants could not put him to proof thereof.

Greenshields v. Bradford, 299.

4. The father of the defendant was in wrongful possession of land from 1844 to 1862, when *P.* the owner mortgaged to *A.*, who assigned to the plaintiff, and interest was regularly paid thereon by the mortgagor until two years before the institution of this suit. In 1865 the defendant wrote to *P.* concerning a purchase of some timber on the lands, and *P.*'s agent went over and measured the timber cut, which was sold to the defendant; and in 1866 *P.* sold timber on the land to strangers.

Held, (1) that such entries upon the land, which were sufficient to constitute trespass if unlawful, interrupted the running of the statute in favour of the defendant, who was tenant at will; and that the written application of the defendant to *P.* was a sufficient acknowledgment of title to prevent the running of the statute as against *P.*, and (2) that the possession of the defendant before the creation of the mortgage which was insufficient at that time to bar the mortgagor, did not run against the plaintiff.

Hooker v. Morrison, 369.

5. An acknowledgment of title by a person in possession of land, given to a mortgagor, is sufficient to prevent the occupant acquiring title under the statute, so as to bar the rights of the persons entitled. For this purpose it is not necessary that the mortgagor should be acting as agent of the mortgagee; the mortgagor for such purpose is a person entitled under the statute.

Id.

6. The defendant, in consideration that his father would convey to him certain lands in the township of Caledon, undertook and agreed to convey to the plaintiff, a younger brother, 100 acres of land in the township of Artemesia. The father conveyed the land to the defendant, but instead of his conveying to the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age.

Held, that under these circumstances the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the Statute of Limitations; but the defendant having denied the agreement to convey, which, however, was clearly established by his own evidence, the Court [*BLAKE, V. C.*,] on dismissing the bill, refused to give the defendant his costs.

Ferguson v. Ferguson, 380.

7. Where a right to relief in respect of land arises during the progress

of a cause, and more than ten years are allowed to elapse before acting thereon, such right will be barred by "The Real Property Limitation Act," R. S. O. ch. 108.

Ross v. Pomeroy, 435.

8. The plaintiffs, the administrator and heirs-at-law of a mortgagee, filed their bill against the mortgagor on or before the 20th October, 1864. After service, and on 15th November, 1864, an agreement was entered into between the parties, whereby the plaintiff took for the mortgage money, the 1st payable 1st June, 1866, and the notes in the six following years, whereupon proceedings on the mortgage were suspended. The defendant made a payment in June, 1867, and died in 1869. The notes were not paid. The suit on 29th August, 1879 was revived against the infant heir of the mortgagor.

Held, that the claim of the plaintiffs was barred by R. S. O. ch. 108, sec. 23; but in case of the plaintiffs desiring to obtain the fruits of a judgment recovered against the original defendant, the suit was retained for a year as against the infant defendant, as he would be a proper party in a proceeding against the personal representative of his ancestor to enforce the judgment.

Ib.

See also "Fraudulent Conveyance," 1.
"Husband and Wife,"
"Mortgage," &c., 8.
"Railway Company," 4.
"Title by Possession."

STYLE OF CAUSE.

See "Demurrer," 1.

SUBMISSION TO ARBITRATION.

See "Arbitration," 4.

SUMMARY APPLICATION AGAINST SOLICITOR.

See "Solicitor and Client."

SURETIES.

See "Loan and Savings Society."

TENANT FOR LIFE.

See "Assent to Sale by,"
"Pleading," 3.

TESTAMENTARY CAPACITY.

See "Mental Capacity."
"Will, invalidity of,"



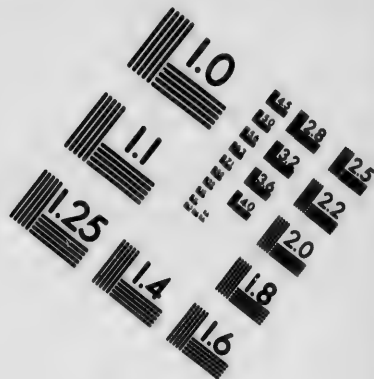
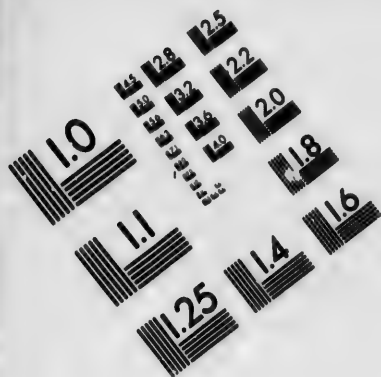
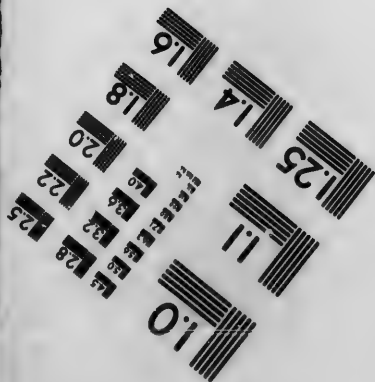
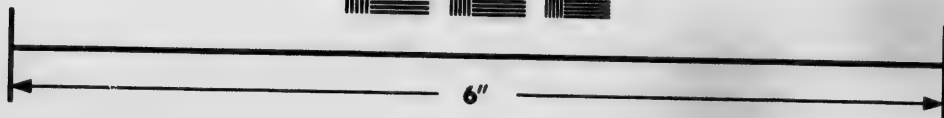
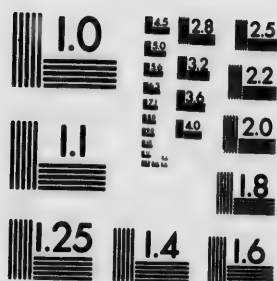


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THREE MONTHS' ABSENCE
[OF MUNICIPAL COUNCILLOR.]

See "Injunction," 2.

TIME FOR ENFORCING AWARD.

See "Arbitration," 1.

TITLE BY POSSESSION.

Where a person enters upon the lands of infants, not being a father or guardian, or standing in any fiduciary relation to the owner, and remains in possession for the statutable period, the rights of the infants will be barred. *Quinton v. Frith*, Ir. R. 2 Eq. 415, considered and not followed.

Re Taylor, 8 P. R. 207, reversed on rehearing.

In re Taylor—Re Lot One, Mississaga Street,
Orillia, 640.

See also "Statute of Limitations," 3.

TITLE, STATEMENT OF.

See "Conveyance in Fee," 2.

TOLLS.

See "Bridge Company," 1, 2, 3, 4, 5, 6.

TRADE MARKS.

The principle "on which the Court protects trade marks is, that it will not permit a party to sell his own goods as the goods of another, a party therefore will not be allowed to use names, marks, letters, or other *indicia*, by which he may pass off his own goods to purchasers as the manufacture of another person." The plaintiff, a resident of New York, was engaged in the manufacture and sale of paper patterns, and under what he considered a permission from, or arrangement with the proprietors of an illustrated paper called "*Harper's Bazaar*," styled such patterns "*Bazaar Patterns*," which words he registered in the United States and in Canada as his trade mark, and for the purpose of extending his business in this Province appointed the defendant his agent for their sale, who, for some years acted in that capacity, and subsequently commenced a like business in his own name, calling his patterns by the same name; stating that they were manufactured by "*A. M. Theal*," while those of the plaintiff were stated to be those of "*James McCall & Co.*," the defendant, however, using envelopes of the same colour and size; lettered and numbered in precisely the same way, the only perceptible difference being in the

name of the alleged agent, which, to casual observers, would readily pass unnoticed. Thereupon the plaintiff filed a bill to restrain the defendant from using the name "Bazaar Patterns," or from otherwise inducing the public to believe that the patterns sold by him were those manufactured by the plaintiff. The Court [BLAKE, V.C.] under the circumstances, thought there was not any exclusive right on the part of the plaintiff to the use of that term; but restrained the defendant from using wrappers similar to those of the plaintiff, or in any other way acting in such a manner as to lead to the belief that the defendant was selling the goods of the plaintiff. The plaintiff, however, having failed in the main branch of the relief sought—the use of the word "Bazaar"—this relief was granted, without costs.

McCall v. Theal, 48.

TREASURER.

See "Loan and Savings Society."

TRIFLING BALANCE DUE ON MORTGAGE.

See "Redemption."

TRUSTEE, &c.

1. *Held*, following the case of *The Commissioners of the Cobourgh Town Trust* ante vol. xxiii., p. 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services; and this whether the harbour belonged to the Dominion or the Provincial Government, as in the event of it being found to belong to the Dominion it must be assumed that the Dominion Government intended the commissioners to be subject to the law of the province in which the trust was to be administered.

Re The Toronto Harbour Commissioners, 195.

2. The sum to be allowed should be such as would be a reasonable compensation for the services rendered, and at the same time such a moderate amount as would not be an inducement to members of the city council or of the board of trade, or others, to seek the office for the sake of the emolument.

Id.

3. The duties of the office being shewn to be not at all onerous, an allowance of \$50 a year was named as sufficient to obtain the services of the right class of men to discharge them.

Id.

4. The rule that a trustee must not have a personal interest in conflict with his duty as such trustee, applies as well to public as to private trusts. Therefore, where one of the commissioners of a harbour had large landed interests adjacent to and upon one part of it, and was inter-

ested in having that portion of the harbour improved, the Court [SPRAGGE, C.,] on directing an allowance to be made to the commissioners for their services, expressly excepted the commissioner so interested from participating therein, and this although he had not applied for any compensation and had at the Board of Commissioners opposed any such allowance being made. *Id.*

See also "Assent to Sale by Tenant for Life," 2.
"Principal and Surety."

ULTRA VIRES.

See "Fire Insurance."
"Mutual Insurance Company."

UMPIRE, APPOINTMENT OF.

One of the stipulations in a contract between the plaintiff and defendant companies was, that if any dispute arose between them it should be referred to arbitration, each of the parties to name an arbitrator, and the two within ten days after the appointment of the one last named, should appoint an umpire; but if either party should neglect or refuse to appoint an arbitrator for the space of ten days after being requested so to do, or should appoint an arbitrator who should refuse or neglect to act as such, then the arbitrator of the party making such request should appoint an arbitrator on behalf of the other party.

A notice by the defendant company requiring the plaintiff company to appoint an arbitrator was duly served on the 10th of June, and on the 19th the plaintiff company, by cablegram from London, named one *C. M. D.*, of New York, as their arbitrator. On the 28th of the same month *S.*, the arbitrator of the defendant company, wrote to *C. M. D.* requiring him to join in the naming of an umpire, but he wrote saying he was about to leave the city, and would return on the 30th; that having been only advised by cable of his appointment and that his commission would be mailed to him, he could not until its arrival intelligently take any action. On the 30th *C. M. D.* returned to his office, and then wrote to *S.* expressing his readiness to act, and at the same time confirmed a nomination made by his partners, during his absence, of an umpire:

Held, (1) that the facts did not establish any refusal or neglect on the part of *C. M. D.* to act as arbitrator, such as would justify *S.* in naming an arbitrator in his stead; (2) that the naming by the arbitrators of an umpire was a judicial act which could not legally be performed by the partners of one of the arbitrators, and his subsequent confirmation thereof was ineffectual.

The Direct United States Cable Co. (Limited) v. The
Dominion Telegraph Co. of Canada, 648.

[Since argued in Appeal.]

UNAUTHORIZED PAYMENTS.

See "Receiver."

UNCONSTITUTIONAL LEGISLATION.

See "Bridge Company," 7.

UNDUE INFLUENCE.

See "Will, Invalidity of."

UNPAID PURCHASE MONEY.

See "Mortgage," &c., 6, 7.

VENDORS AND PURCHASERS' ACT, R. S. O. CH. 109.

Though on a bill filed for specific performance, if the infant children ultimately entitled under the settlement were made parties, the Court might order the completion of the sale and payment of the money into Court for investment, where the *corpus* of the estate would be protected for the children, yet on application under the Vendors and Purchasers' Act, in the absence of the other parties to the settlement, it would not compel the purchaser to accept the title.

Re Treleven and Horner, 624.

VESTED INTEREST.

See "Will, Construction of," 3.

VESTED REMAINDER.

See "Will," &c., 6.

VOLUNTARY DEED.

Where it was shewn that a voluntary deed had been executed without independent advice, the grantor standing in such a relation to the grantee, as that he was likely to be under her influence, the Court [SPRAGGE, C.,] owing to the peculiar relationship of the parties, set the conveyance aside, although no fraud or moral wrong could be imputed to the grantee; and although it was probable, from all the circumstances of the case, that if the contents and legal effect of the instrument had been fully explained to

the grantor by an independent legal adviser, the grantor would still have executed the deed though probably with some modifications in the details. The relief was granted without costs, however, as no case of actual fraud was established;—in this following *Lavin v. Lavin*, ante vol. xxvii., p. 567, which was approved and affirmed on Appeal, 24th March, 1882.

Irwin v. Young, 511.

VOTES, NEXT HIGHEST NUMBER OF.

See "Municipal Council," 1.

WAIVER.

See "Dower."

WAREHOUSEMAN.

See "Warehouse Receipts."

WAREHOUSE RECEIPTS.

1. By the Act 34 Vict. ch. 5, (D.) it is not necessary to the validity of the claim of a bank under a warehouse receipt, that the receipt should reach the hands of the bank by indorsement; the bank itself may make the deposit, and receive from the warehouseman the receipt.

Smith v. The Merchants' Bank, 629.

2. A bank had discounted for a trading firm, on the understanding that a quantity of coal purchased in the United States by the firm should be consigned to the bank, and that the bank would transfer to the firm the bills of lading, and should receive from one of the members of the partnership his receipt as a wharfinger and warehouseman for the coal as having been deposited by the bank, which was accordingly done. The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents and filed a bill impeaching the validity of the receipt. It appeared that the insolvents had mixed the coal with other coal, and had sold some of it, and that all the coal in the premises was not sufficient to answer the quantity comprised in the receipt. Under these circumstances it was *held*, that the bank had a right as against the assignee—as it would have had against the insolvents—to hold all the coal in store of the description named in the receipt, and also to payment for any such coal as might have been sold by the plaintiff. *Ib.*

3. The provisions of the 34 Vict. ch. 5, (D.,) as to warehouse receipts do not invade the functions of the Provincial Legislature by an interference with "property and civil rights" in the Province. *Ib.*

[Since argued in Appeal.]

WIFE'S CHOSE IN ACTION.

See "Husband and Wife,"

WIFE, UNDERTAKING TO RECEIVE.

See "Marriage," 5.

WILL, CONSTRUCTION OF.

By his will and codicil a testator devised to his son *J.* on the death of his mother, certain land in consideration for which he was to pay the sum of £150 to the executors in four years. In the event of his dying without heirs the land was to be sold and the amount received therefor over and above £150 "to be equally divided amongst my surviving children."

Held, (1) that *J.* took a fee-tail in remainder after an implied life-estate in favour of the mother, as the "dying without heirs" must be taken to mean heirs of the body, not heirs general, he having brothers and sisters still living:

J. died during the lifetime of his mother.

Held, (2) that the period of division should be the death of the tenant for life, and the survivors at the time of such death were to take the whole amount realized by the sale of the lands upon which, however, the £150 was to form a charge.

Tyrwhitt v. Dewson, 112.

2. The testator was seized of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, *R.*, to whom the first privilege of redeeming was given, availed himself thereof, and redeemed the property, which was subject to certain charges imposed by the will, in addition to the incumbrances.

Held, that the right to redeem was in effect a right to purchase, as the mortgages and charges created by the will amounted to about as much as the land was worth; and that *R.* had acquired a good title free from any claim of his brothers; and his brothers having instituted proceedings against him claiming an interest in the estate that he was entitled to recover his costs, not out of the estate of the testator but from the plaintiffs personally.

Stevenson v. Stevenson, 232.

3. The testator gave £1,500 by will to his widow, and in the event of her marrying again or dying intestate, the sum was at her death to be divided share and share alike among "my heirs (my brothers' children)." The widow did marry again, and a daughter of *W.*, a brother of the testator, died after the marriage but before the death of the widow, and so before the time for distribution.

Held, that the rule in such a case is, that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow, and that this was a share vested in the deceased child of *W.*, which passed to her representatives.

Webster v. Leys, 475.

4. The bill for the administration of the estate of *G. E.* alleged that *G.* had appointed his brother *J. E.* his executor, and devised to him all his estate upon trust for the benefit of the testator's wife and children as to *J.* would seem best: the will giving *J.* power to sell the realty. *J. E.* proved the will of *G.*, and shortly after his death made his own will by which he purported to dispose of *G.*'s estate, the validity of which the bill impugned, and *C. S. D.*, a married daughter of *G.*, was made a defendant, the bill alleging her to be the wife of *S. H. D.* *J. E.* made an appointment under *G.*'s will, whereby *C. S. D.* became entitled to a portion of the estate. The defendant demurred on the ground that *S. H. D.* should have been a party.

Held, that the interest of *C. S. D.* was merely a chose in action not reduced into possession by her husband, in respect of which she might be sued as a *feme sole*, and therefore the demurrer was overruled with costs following *Lawson v. Laidlaw*, 3 App. R. 77.

Sivewright v. Leys, 498.

5. The bill distinctly charged that the defendant had misapplied the moneys of the estate of *G.* mixing them with his own and employing them for his own purposes, a demurrer *ore tenus* that *G.*'s estate was not properly represented, on the ground that one executor could not represent the estates of both *G.* and *J.*, was also overruled with costs; for although during the progress of the cause it might become necessary to have different persons represent the two estates that did not constitute a ground of demurrer.

Ib.

6. A testator devised certain real estate "to be owned, possessed, and inherited by my wife during her natural life subject to the further provisions of my will," followed by a devise to "*W. G.* when he is of the age of twenty-three years, two hundred acres, or if sold before he arrives at the years mentioned, that some other lot of land or money amounting in value to the above mentioned lot be given him in lieu thereof."

Held, that the wife took a life estate with a vested remainder over to *W. G.*, and the testator having shortly before the date of his will contracted for the sale of the land so devised, that the estate of *W. G.*, who died during the life of the widow, and before he had attained twenty-three, was entitled to the proceeds of such sale.

Held, also, that "two hundred acres of land, the west half of lot No. 14" was *falsa demonstratio* of the west half; the testator having referred to the whole lot as being two hundred acres in a subsequent part of the will.

Holtby v. Wilkinson, 550.

WILL, INVALIDITY OF.

The testator's habits of intemperance were such that his wife and children were compelled to abandon his residence about twelve or thirteen years before he died, after which his health became completely undermined by his indulgence in strong drink. About three weeks before his death, and while confined to bed, from weakness and general debility, acting on the suggestions of persons about him, he obtained through the intervention of his brother-in-law, whose children took a valuable interest under his will, the services of a solicitor, who took instructions from him and prepared his will in accordance therewith, which will was executed by him in presence of such solicitor and another witness. By his will he deprived his own family of the greater portion of his property, devising it to the children of his brother-in-law. Medical evidence was adduced, tending to shew that from the long continued habit of drinking in which the testator had indulged, his mind was in such a state as to render him unfit to make a will; on the other hand, a medical practitioner, who was attending him at and subsequent to the time the will was executed, swore he was competent to do so, and the professional gentleman who prepared the will was also of that opinion. The Court [SPRAGGE, C.] on a balance of the evidence, decided in favour of the testamentary capacity, apart from the insane delusion hereinafter mentioned; but it was clearly established that the testator, after such separation between himself and his family had continued for about nine years, became possessed of the idea that his youngest child, a daughter, was not his; and although there did not exist any ground for such suspicion, his friends were unable to change his convictions in this respect, and in consequence thereof he refused to make, and did not make any provision for such child by his will. The Court considering this an insane delusion, *held*, that in consequence the will became wholly inoperative—not inoperative in part only, that is, as regards the daughter for whom no provision had been made; and dismissed a bill filed to establish the will, with costs to be paid by the parties seeking that relief; not out of the testator's estate.

Bell v. Lee, 150.

[Since argued in Appeal.]

WILL OBTAINED BY INTERROGATION.

See "Mental Capacity."